(19,007.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 356.

THE AMERICAN STEEL AND WIRE COMPANY, PLAINTIFF IN ERROR,

vs.

R. A. SPEED, CLERK OF THE COUNTY COURT OF SHELBY COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

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1 Chancery Court of Shelby County.

AMERICAN STEEL AND WIRE CO.
vs.
R. A. SPEED, Clerk County Court. } No. 12297.

Patterson, Neely & Henderson, attorneys for complainant.
Greer & Greer. Carroll, McKellar & Bullington, attorneys for defendant.
T. B. Calldwell, C. & M.

Filed March 9th, 1903.

JNO. W. BUFORD, *Clk.*

2 Chancery Court of Shelby County.

STATE OF TENNESSEE,
Shelby County.

Be it remembered, that at a term of the chancery court of Shelby county, State aforesaid, begun and held at the court house in the city of Memphis, in and for said county, on Monday, the 6th day of October 1902, the same being the first Monday in October 1902, present and presiding the Hon. F. H. Heiskell chancellor of said court, the following proceedings were had to-wit:

Original Bill.

Filed 20th Day of October, 1902.

In the Chancery Court of Shelby County, Tennessee.

AMERICAN STEEL AND WIRE COMPANY
vs.
ROBERT A. SPEED, Clerk of the County Court. } No. 12297, R. D.

To the Honorable F. H. Heiskell, chancellor of Shelby county, Tennessee:

Your complainant, American Steel & Wire Company, respectfully brings this, its bill of complaint, against Robert A. Speed as clerk of the county court of Shelby county, and complaining, now represent- unto your honor, that it is a corporation created and existing under the laws of the State of New Jersey, and with its situs in the State of New Jersey. That it has a general office in Chicago, in the State of Illinois, from which it transacts its business carried on in the South and West.

Complainant is engaged in the manufacture of nails of the various grades, barbed and smooth wire of the various grades,
3 and staples, and, for the manufacture of such goods, it has a number of manufacturing establishments principally situated in Pennsylvania, Ohio and Illinois; all of which are north of the Ohio river, and without the territorial limits of the State of Tennessee. Prior to about the 1st day of February 1900, the goods manufactured by the complainant were usually shipped in car-load lots to its various customers throughout the South-west and while business was being conducted in this way, there was never any question raised as to complainant's liability for taxes alleged to be due the various States in the South-west in which its customers did business, and to whom its goods were sold and consigned. About the 1st day of February 1900, complainant was led to believe that if it would adopt Memphis, Tennessee as the distributing point for its manufactured products, it would result in a great convenience to the trade, and enable complainant to get cheaper rates of transportation. It would be a convenience, because Memphis, the distributing point, would be much nearer the customers of complainant, and the goods they had purchased could be more promptly and conveniently delivered. It would result in cheaper transportation, because complainant could avail itself of river transportation, and, by shipping the products of its manufacture to Memphis in barges, down the Ohio river, and Mississippi river, it could, at cheaper freight rates, assemble its goods at Memphis for distribution. Thereupon, complainant entered into an arrangement with the Patterson Transfer Company, a corporation created under the laws of Tennessee, and doing the business of a common carrier at Memphis, whereby the Patterson Transfer Company was to receive, assort and distribute to the various customers of complainant, the goods consigned to the port of Memphis.

Complainant, in order to show more particularly unto your honor the method by which its business is transacted states, that the goods manufactured by complainant vary very greatly in grade. There
4 are many different kinds of nails, of barbed wire and smooth wire, and there are differences even in the grades of staples by which the wire is held.

Complainant has agents travelling over the south-western country soliciting orders for its goods, even prior to the time they are manufactured. The method of doing buisiness is this, the customers agrees, in a written contract, that they will, within as specified time—say sixty or ninety days—take so many kegs of nails, so many reels of barbed wire and so many coils of smooth wire, or so many kegs of staples; but the contracts do not specify the grade of nails, of wire, or of staples, and the customer when he desires a delivery under this contract, has the right, under the contract, to specify the character of the goods he desires to have delivered. These goods are sold more frequently than otherwise, before they are manufactured, and as promptly as they are manufactured, they are forwarded from the manufactories, usually by river, that being the preferable

mode of transportation, and on barges, to the port of Memphis. However, a part of the goods so manufactured and distributed at Memphis, are forwarded to Memphis by rail. These goods so forwarded to Memphis by rail or water, are consigned to complainant; but the Patterson Transfer Company is authorized to receive same at Memphis, and to assort and re-ship the same on the orders of customers, which orders are forwarded by the office of complainant at Chicago.

Complainant further shows unto your honor, that the Patterson Transfer Company is engaged in the business of a common carrier, and transports goods and passengers to and from the river landings and various railroad depots at Memphis, and to and from business houses to such landings and depots. Under the arrangement by which the Patterson Transfer Company was to receive, assort and distribute the goods of complainant consigned to Memphis, it became necessary for the Patterson Transfer Company to rent warehouses, at, and from which the goods could be received, assorted and distributed.

5 Complainant further shows unto your honor, that the Patterson Transfer Company is not engaged in the business of merchandising, and neither is it in the business of a broker; but it is simply a common carrier, and its services in relation to the manufactured products of complainant are only such services as a common carrier might render.

Complainant further shows unto your honor, that none of its manufactured products are held for sale at Memphis or sold. Complainant alleges that the Patterson Transfer Company has never sold, at any time, any part of its manufactured products received and stored at Memphis; that said company had no right, power, or authority from complainant to sell its manufactured products, and has never offered same for sale; has neve- fixed a price upon such goods, and has never collected or received money from purchasers of such goods. The business of the Patterson Transfer Company has been solely and entirely that of a common carrier, and not otherwise.

Complainant alleges the fact to be that, almost in every instance, the goods are sold before their arrival in Memphis, and, in fact, are generally sold before they leave the manufactories of complainant, and are frequently sold before they are even produced at the manufactories. The nature of the business is simply this; that large quantities of the goods of complainant are sold throughout the south-western country, and, under the arrangement with the Patterson Transfer Company they are assembled, over the lines of transportation running into Memphis, at Memphis, and there they are received by the Patterson Transfer Company, and assorted and distributed to the various customers of the complainant. The travelling salesmen of complainant, who make the contracts with the customers, have no dealings with the Patterson Transfer Company, but deal directly with the customers of complainant, and the contracts, when made, for the goods of complainant to be delivered in the future

are forwarded to the office at Chicago, and then, when the customer specifies the character and amount of nails, barbed wire,
6 smooth wire, or staples that he desires delivered under his contract, the specification is sent to the office at Chicago and, from the office there, sent to the Patterson Transfer Company, whose business it is to receive and assort the goods and then to distribute them to the customers in accordance with the specifications thus sent in. From the time the goods leave the manufacto-ies of complainant down to the time they are delivered on the specifications thus sent in by the customers, they are *in transitu*, and in the possession and control of the various common carriers, who handle the goods from the inception of their shipment at the manufacto-ies down to their ultimate delivery to the customers, and the Patterson Transfer Company is only one of the common carriers so engaged.

Complainant would further show unto your honor, that the custom of transacting the business, as above stated, applies particularly to all the goods sent to Memphis and re-shipped from Memphis by the Patterson Transfer Company to other points; but complainant has customers doing business in the city of Memphis, and, in order to accommodate such customers, and to facilitate their business, complainant is accustomed to inform the Patterson Transfer Company of the names of its customers at Memphis, and the Patterson Transfer Company being advised as to who are the customers of complainant doing business at Memphis, such customers who have made contracts with complainant for the delivery of goods within sixty or ninety days, frequently make out specifications in duplicate and deliver the specifications to the Patterson Transfer Company, and thereupon the Patterson Transfer Company, under instructions of the complainant, delivers the goods to the customer, taking his receipt for same, and then forwards the original specification with the dray receipt attached to complainant at Chicago; but, in every instance, the invoice of the goods so delivered is made out at the office in Chicago and sent to the customer at Memphis. In no single instance does the Patterson Transfer Company fix the price, or even know the price, of the goods, or have anything to do with the
7 goods, except to re-ship and forward the same to purchasers living away from Memphis, and deliver the same to customers living at Memphis.

Complainant further shows that it does not advertise or hold out its goods for sale at Memphis, and, in point of fact, they are never sold there, and there has never been a time during the existence of the arrangement between complainant and the Patterson Transfer Company when one desiring to purchase such goods could go to the office of the Patterson Transfer Company, or its warehouse, and purchase such goods. There has never been a transaction of that character. On the contrary Memphis is merely the distributing point for complainant's manufactured products, and they leave its various manufacturing establishments, all of which exist beyond the limits of Tennessee, and go over the various lines of railroads and barge lines to Memphis—that is to say, over the lines of the com-

mon carriers running into Memphis, and, in this way the goods, after they are sold, are assembled at Memphis for distribution to the various customers of complainant residing at Memphis and other points throughout the south-western country.

Complainant further shows unto your honor, that, under this arrangement, its manufactured products were received, assorted and distributed to its customers at Memphis from about the first of February 1900, down to the present time, and not until recently was any attempt made to tax the goods of complainant. Recently one C. D. M. Greer, a revenue agent for the State of Tennessee, took steps before defendant Robert A. Speed, clerk of the county court of Shelby county, to have complainant back-assessed for taxes, as a merchant doing business in the city of Memphis. The said clerk thereupon, at the instance of the said Greer on the 8th day of August 1902 made said assessment, and estimated complainant's property situated in the storehouses of the Patterson Transfer Company at Memphis to be worth, for the purpose of taxation for the year ending February first 1901, the sum of seventy-two thousand three hundred and twenty-six ($72,326) dollars, and for the year
8 ending February the first 1902, one hundred and sixty-six thousand two hundred and seventy-five ($166,275) dollars, the principal of which sums he adjudged to be liable for an ad valorem tax, and ten (10%) per cent. of which he adjudged to be liable for a privilege tax.

Complainant now shows unto your honor, that its said property was assessed for the said years to pay a tax of eight hundred and seventy dollars and ninety-nine cents ($870.99), a clerk's fee of three dollars and fifty cents ($3.50), commissions to said Greer as revenue agent, who applied for the assessment, one hundred and forty dollars and sixty-five cents ($140.65) and court costs amounting to sixteen dollars and thirty cents ($16.30)—making a total of one thousand and thirty-one dollars and fourty-four cents ($1,031.44).

Complainant further shows unto your honor, that on the 16th day of August 1902, it appealed from the action of the said Speed, making said assessment, to the State board of equalizers at Nashville, and said board of equalizers, on October the 10th 1902, approved and affirmed the action of the said Speed. Thereupon, complainant, following the direction of the statute in such cases made and provided, on the 18th day of October 1902, paid to the said Robert A. Speed, as clerk of the county court of Shelby county, said sum of one thousand and thirty-one dollars and forty-four cents under protest—complainant at the time the payment was made, protesting that it was not liable for the payment of said taxes.

Complainant would now further show unto your honor, that the assessment and collection of such tax, was in direct violation of section 8, article 1 of the Constitution of the United States, which expressly provides that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and among the Indian tribes." Complainant avers that the assessment and collection of said taxes was a direct regulation and interference

with inter-state commerce, and now shows unto your honor
9 that all of its manufactured products are produced at manufactories doing business beyond the limits of Tennessee. It has no place of business in Tennessee, and every dollar's worth of its goods coming into Tennessee are brought from its manufactories beyond the limits of the State, not for sale, but in the original packages for distribution to its customers.

Complainant alleges that the nails manufactured by it are all put in separate packages called kegs, and each keg showing on its head the quality of the nails it contains; all of the barbed wire manufactured by complainant is put up on reels, each kind of barbed wire separate to itself, and each reel of barbed wire being a separate and distinct package to itself. All of the smooth wire put up by complainant is put up in bundles, each bundle being tied by wire, and each bundle being separate and distinct from every other bundle; and the staples manufactured by complainant for the purpose of holding the wire in place are also put up in separate and distinct kegs. Not only are these various packages separate and distinct one from the other, but no single package contains two different grades of goods, but each package is confined to one grade, and so marked as to be easily distinguishable.

Complainant alleges that the packages in which its various manufactured products are put up are exactly suited for commercial purposes, and, in this form can be easily and expeditiously handled, and they leave the manufactories in this form, and in this form are received by the carriers at the initial points of shipment, and then transported in this form to Memphis. They are there received, stored, assorted, re-shipped and distributed by the Patterson Transfer Company in this form. The original packages in which the goods are put up are never broken from the initial point until they are delivered to the various customers. They are, in every particular, and essentially, the original packages of commerce,
10 starting from the initial point of shipment, beyond the limits of Tennessee, and coming over the various lines of common carriers to Memphis, they are there re-shipped or distributed to the customers of complainant in their original form. They are not shipped to Memphis for sale; and are not offered there for sale; but solely for the purpose of distribution, and in the original packages.

Complainant is advised, and so charges, that such shipments of its goods are within the protection of section 8, article 1 of the Constitution of the United States, and cannot be taxed in the original packages prior to the times they are delivered to the customers of complainant.

Again, complainant is advised, and so charges, that the assessment and collection of said tax was in direct violation of section 8, article 1 of the Constitution of the United States, because, as complainant is advised, its manufactured products, at the time said assessment was made, were *in transitu* at Memphis, and were therefore the subjects of inter-state commerce and not subject to taxation.

Complainant alleges the fact to be that, from the moment said

goods are shipped from its manufactories north of the Ohio river, to the port of Memphis, down to the time they are actually delivered to the customers of complainant who have purchased the same they are, in point of fact, in process of transportation, and *in transitu*, and are therefore under the protection of the Constitution of the United States, and are not subject to taxation in Tennessee.

Complainant is advised, and so charges, that its property is not subject to taxation in Tennessee while it is *in transitu* from one State to another, and that before it can be subjected to taxation, it must come to its destination and there become commingled with the property of Tennessee.

Complainant is advised, and so charges, that so long as its manufactured goods, coming from another State into Tennessee, re-
11 main in their original packages, uncommingled with the property of Tennessee, they are not subject to taxation; and it is further advised that its manufactured products coming from another State into Tennessee, not for the purpose of sale or barter, but solely for the purpose of distribution and delivery through the instrumentality of common carriers to the customers of complainant, are not the subject of taxation, and can not be taxed until they arrive at their destination and are commingled with the property of Tennessee.

Complainant further shows unto your honor that said tax is an unjust and discriminating tax against the manufactured products of other States. Section 30, article 2 of the constitution of Tennessee is as follows: "No article manufactured of the produce of this State shall be taxed, otherwise than to pay inspection fees." Complainant alleges the fact to be that all of its manufactured products, nails, barbed wire, smooth wire, and staples are manufactured from the products of other States, and therefore complainant cannot claim that its goods are manufactured out of Tennessee products; yet, complainant alleges the fact to be, that Tennessee largely produces the material out of which complainant's goods are manufactured.

Complainant is advised, and so alleges the fact to be, that, if its goods were manufactured out of the produce of Tennessee, it would not be subject to taxation, except otherwise than to pay inspection fees; and to assess complainant's property, and to require it to pay taxes, operates to discriminate between goods manufactured out of the produce of Tennessee and the produce of other States, and consequently the assessment and collection of such tax was contrary to section 8, article 1 of the Constitution of the United States, because in this particular, it was a direct interference with commerce between the States.

Complainant now alleges, that, notwithstanding it was assessed as a merchant and required to pay taxes as a merchant, it is, in no proper sense, engaged in the business of merchandising, and
12 is not a merchant in Tennessee. It has not now, and never has had, a place in Tennessee where it held out its goods for sale; where it fixed a price upon its goods, or from which it dealt with customers.

Complainant represents the fact to be, that Memphis, in recent years, has become the chief distributing point of the south-western country, and by reason of its facilities for water and railroad transportation, it was adopted by complainant as the chief distributing point for its goods in the South-west, and its goods were assembled at Memphis for this purpose, and none other.

Complainant now alleges that it paid said sum of one thousand and thirty-one dollars and forty-four cents ($1,031.44) on the 18th day of October 1902, to the said Robert A. Speed, as clerk of the county court of Shelby county, Tennessee, under protest, and now brings this suit to recover the same.

Premises considered, complainant prays that said Robert A. Speed, clerk of the county court of Shelby county, be made a party defendant to this bill; that a subpœna issue as to him, and that he be required to answer the allegations of this bill, but not under oath, his oath being expressly waived.

At the final hearing of this cause, complainant further prays for a judgment or decree against the said Robert A. Speed, clerk of the county court of Shelby county, for the said sum of on- thousand and thirty-one dollars and forty-four cents, together with interest thereon from the date of its receipt by said Speed, and for such other, further and general relief as to your honor may seem appropriate.

PATTERSON, NEELY & HENDERSON,
Sol's for Complainant.

Cost Bond.

We, American Steel & Wire Company, as principal, and ——
13 —— as surety; acknowledge ourselves indebted to Robert A. Speed, clerk, in the sum of two hundred and fifty dollars, to be void if the said American Steel & Wire Company complainant in a bill which has this day been filed in the chancery court of Shelby county against the said American Steel & Wire Co., shall pay all such costs as may be awarded against it by the court in its decrees and orders in said cause.

This 20th day of Oct. A. D. 1902.

AMERICAN STEEL & WIRE COMPANY,
By PATTERSON, NEELY & HENDERSON, *Att'ys.*
R. GALLOWAY.
B. R. HENDERSON.

Subpœna to Answer.

Issued 21st Day of October, 1902.

The State of Tennessee to the sheriff of Shelby county:

Summon Robert A. Speed, clerk of the county court, if to be found in your county, to appear before the chancery court of Shelby county, at the court house in Memphis, Tenn., on the first Monday in De-

cember 1902 next, then and there to answer the bill of complaint of American Steel & Wire Co., a copy of which accompanies this writ. Herein fail not, and have you then and there this writ.

Witness, T. B. Caldwell, clerk and master of said court, at office in Memphis, this first Monday in October 1902.

T. B. CALDWELL, *Clerk & Master*,
By THOS. B. CRENSAW, *D. C. & M.*

Sheriff's Return.

Executed by reading this writ to Robert A. Speed clerk of county court & by leaving a copy of bill with him.

G. W. BLACKWELL, *Sh'ff*,
By W. L. CLARK, *D. S.*

Oct. 23, 1902.

14 *Receipts for Taxes Paid under Protest.*

Filed Oct. 20, 1902.

STATE OF TENNESSEE, }
Shelby County. }

Office of county court clerk, O 283, Memphis, Tenn.

A firm composed of American Steel & Wire Co., having paid unto my hands the sum of six hundred and six $\frac{52}{100}$ dollars, for the use of the State and — dollars for the use of the county, being taxed by them for the year, from 1st day of February 1901, to 1 day of February 1902, merchant, at city.

This 18 day of Oct. 1902.

Witness:

R. A. SPEED, *Clerk*,
By JNO. E. KELLEY, *D. C.*

(Paid under protest.)

[On the margin:] Post this license in a conspicuous place.—If you fail to report and settle at the expiration of this license, or when you quit business or make any change in the firm, judgment will be taken on your bond.

No. *253*
Countersigned
Oct. 18 1902.
Fees 50c. Paid. Clerk. By W. W. Thompson D. C.

State tax	$581.96
" " (privilege)	24.93
Toatal tax paid	$606.89
Clerk's fees	1.00
Countersinging fees	.50
Revenue agent	140.63
Court cost	16.30
	$765.34

15 STATE OF TENNESSEE, }
Shelby County. }

Office of county court clerk, O 282, Memphis, Tenn.

A firm composed of American Steel & Wire Co., having paid into my hands the sum of two hundred fifty-three $\frac{00}{100}$ dollars, for the use of the State and ten $\frac{00}{100}$ dollars for the use of the county, being tax due by them 1 day of Febr'y 1901, to 1 day of Feb'y 1902, merchant at city. This 18th day of Oct., 1902.

Witness:

R. A. SPEED, *Clerk*,
By JNO. E. KELLY, *D. C.*

(Paid under protest.)

[On the margin:] Post this license in a conspicuous place.—If you fail to report and settle at the expiration of this license, or when you quit the business, or make any change in the firm, judgment will be taken on your bond.

No. *254*.
Countersigned.
Oct. 18th 1902.
Fees 50c. Paid. Clerk. By W. W. Thompson D. C.

State tax	$253.14
" " (privilege)	10.84
Total tax paid	263.98
Clerk's fees	1.00
Countersigning fee	50c.
	$265.48

(Paid under protest.)

STATE OF TENNESSEE, }
Shelby County. }

I, Robert A. Speed, clerk of the county court of said county and State, do hereby certify that on the 8th day of August 1902, I back-assessed the property of the (the) American Steel & Wire Company for the year ending February the first 1901 on a valuation of seventy-two thousand three hundred and twenty-six dollars ($72,326), and for the year ending February the first 1902 on a valu-
16 ation of one hundred and sixty-six thousand two hundred and seventy-five dollars ($166,275,) and adjudged that said company was a merchant doing business at Memphis, and was adjudged to pay a tax of thirty-five (35 cents) cents on the hundred dollars to the State of Tennessee on said valuations for said years, and fifteen (15) cents on the hundred dollars on ten (10 %) per-cent. of said valuations as a privilege tax. The taxes so assessed amounted in the aggregate to eight hundred and seventy dollars and ninety-nine cents ($870.99), my fee amounted to three dollars and fifty cents ($3.50), the commissions of C. D. M. Greer, revenue agent, amounted to one hundred and forty dollars and sixty-five cents ($140.65), and the court costs amounted to sixteen dollars and thirty cents; the whole amount, including taxes, fees, costs and commissions amounted to one thousand and thirty-one dollars and forty-four cents ($1,031.44) all of which are for State taxes and costs.

I hereby further certify and acknowledge that on this 18th day of October 1902, said American Steel & Wire Company has paid me, under protest, said sum of one thousand and thirty-one dollars and forty-four cents, in full discharge of said taxes, fees, commissions and costs, and I have received the same. I further certify that, at the time of said payment, the said American Steel and Wire Company protested that it was not liable for the payment of any part of said taxes, fees, costs or commissions; but on the contrary, that its property was not subject to taxation in Tennessee; that it was engaged in inter-state commerce, and that said assessment made by me on the 8th day of August 1902, and the proceedings thereunder, whereby it was required to pay to me, for the State of Tennessee, said sum of one thousand and thirty-one dollars and forty-four cents ($1,031.44) was null and void, because it was in violation of section 8, article 1 of the Constitution of the United States.

Given under my hand this the 18th day of October, 1902.

R. A. SPEED, *Clerk.*

17 *Demurrer of Defendant, Filed, & Counsel Notified, November 14th, 1902.*

In the Chancery Court of Shelby County, Tennessee.

THE AMERICAN STEEL & WIRE COMPANY
vs.
R. A. SPEED, of the County Court.

Comes the defendant and demurs to the bill of complainant herein and for cause of demurrer says:

I.

That the bill shows on its face that the city of Memphis, in the county of Shelby and State of Tennessee, has, by reason of its facilities for water and railroad transportation, been selected by the complainants as their chief southwestern distributing point for their goods, and the goods of complainant were assembled at Memphis for this purpose, during the years in this bill set forth, and this demurrant says, shows such a commingling of the goods of complainant with the taxable properties of and in Tennessee, that subjects them to taxation, and no taxes being tendered therein, this bill is not maintainable.

II.

That that rpovision in the organic law, exempting from taxation articles manufactured of the products of Tennessee, otherwise than to pay inspection fee, is not contrary to section 8 of article 1 of the Constitution of the United States.

Wherefore, defendant prays the judgment of this court etc.

JAMES M. GREER,
WM. D. CARROLL,
Of Counsel for D'f't.

18 *Answer of R. A. Speed.*

Filed 14th Day of Nov., 1902.

In the Chancery Court of Shelby County, Tennessee.

THE AMERICAN STEEL & WIRE COMPANY
vs.
R. A. SPEED, Clerk.

Answer of the defendant.

This respondent, for answer to so much and such parts of the bill as he is advised it material for him to make answer, says:

He admits that the plaintiff is a corporation by the laws of the

State of New Jersey; that it has a general office in Chicago in the State of Illinois, but he denies that from that office it transacts its business carried on in the South and West; admits that it is engaged in the manufacture of nails of various grades, barbed and smooth wire of various grades, and staples, and that for the manufacture of such goods, it has manufacturing establishments situated as stated in the bill.

Further answering, respondent says he has no knowledge, and no information sufficient to warrant him in having any belief, on the subject as to the manner in which the complainant conducted its business prior to the 1st of February 1900, and neither has he any knowledge or information sufficient to justify him in having any belief on the subject, as to whether or not the question was raised as to the complainant's liability for taxes in any of the States of the Southwest.

But further answering this respondent says he admits that this city is well adapted to be a fine distributing point for the manufactured goods of complainant, resulting in great convenience to the trade, and enabling complainant to get cheaper rates of transportation, and that by means of the Mississippi river and the Ohio river, complainant could, at cheaper freight rates, assemble the goods at Memphis for distribution. He denies the arrangement with
19 the Patterson Transfer Company, as stated in the bill, and calls for proof of such arrangement. That complainant's goods varied greatly in grade. There are many different kinds of nails, of barbed wire, and smooth wire and differences even in the grade of staples.

Admits that complainant has agents travelling over the Southwest, soliciting orders for its goods, even prior to the time of their being manufactured. Admits the method of doing business, as stated in the bill, and the forwarding of goods as stated, the authority of the Patterson Transfer Company to receive the same, and to assort and re-ship the same on the orders of the customers, and admits that some of these orders are forwarded from Chicago, but denies that all of them are.

Further answering this respondent says, that he is advised, that the river and railroad transportation of the goods shipped to Memphis, ended when they reached the terminus or station in that city, and are there, unshipped, and anything in the way of land transportation by the Patterson Transfer Company, was a new and distinct service, and that the depositing of the goods in the warehouses of the Patterson Transfer Company, (a duty which this respondent admits it became necessary for that company to render) and there putting them at rest, to be assorted and distributed, was such a commingling and intermingling of such goods with the properties of Tennessee, as to render them subject to general taxation in the said State, and the dealings thereafter with these properties of complainant, by deliveries of the mass thereof, in fulfillments of contracts of sale, was the carrying on of the business of a merchant in the city of Memphis.

This respondent admits the Patterson Transfer Company is not engaged in the business of merchandising, or in the business of a broker. Admits it is carrying on the business of an ordinary transfer company in the city of Memphis, but denies that its services and relation to the manufactured products of the company are only such services as a common carrier might render. On the contrary, this respondent avers that it fulfills all the duties of a general
20 agent of the complainant, conducting a merchandise business at Memphis, in that it warehouses, selects and appropriates the merchandise sold while in Memphis, and makes deliveries thereof upon the orders of i-s employer.

Respondent further answering says he denies that none of the manufactured products of complainant are held at Memphis, or are sold at Memphis. On the contrary, he is informed and avers the fact to be that all of its manufactured products are held for sale at Memphis, and are sold at Memphis. At least such products as are warehoused and at rest from time to time in the said city. The allegation in regard to sales never having been made by the Patterson Transfer Company, as stated on the fourth page of the bill of complaint, is put in issue by the denial of the matters and things stated in the second sentence from the top of the page.

And further answering this respondent says that the business of the Patterson Transfer Company has not been that of a common carrier, but of a warehouseman and general agent of the complainant as well.

Further answering this respondent says: that it is not true that in almost every instance the goods are sold before their arrival at Memphis, or in fact are generally sold before they leave the manufactories, or are frequently sold before they are even produced by the manufactories. The truth is, that from time to time the complainant makes contracts of an executory character, for the sale and delivery of goods, and when the goods are delivered in fulfillment of such contracts from Memphis, the executory contract of sale becomes an executed contract in every instance, by the delivery of the goods at and from Memphis, the said goods being then the property of the complainant, who is the seller, and continuing the property of the complainant until the delivery thereof to the vendee, in fulfillment of an executory agreement to buy and sell.

This respondent has no means of arriving at the fact in regard to the nature of the business of the complainant, but he admits that the business is carried on substantially as stated in the bill
21 of complaint, but he is advised that notwithstanding the statements thus made, that the business of the complainant is in fact carried on at and from Memphis, and that the goods warehoused at Memphis, at rest, and there distributed from Memphis to the customers, in accordance with specifications sent in the Chicago office, as stated in the bill, is both an intermingling of the goods of the complainant with the other properties in the State of Tennessee, and is the carrying on of the business of merchants at Memphis, by the dealings set forth in the bill of complaint.

Further answering this respondent says that he denies the proposition set forth on the 5th page of the bill of complaint in reagrd to the goods being *in transitu*. On the contrary he avers that the service set forth as being rendered to the complainant by the Patterson Trnasfer Company, in the bill of complaint, conclusively shows that it is in nowise a part of interstate commerce.

That the carting of them from the warehouse to the depot or river landing, where the journey of each lot is to commence, in order to reach the ultimate destination for the vendee, is not part of that journey which begins at Memphis and ends at the destination, but is all preliminary work performed for the purpose of putting the property in a state of preparation and readiness for transportation, and that the warehousing of the property, for selection assortment, appropriation to contracts of sale and distribution, puts the property at rest, ends its journey, and that a shipment from the warehouse is the beginning of a separate journey of each lot of goods sold; is a new and distinct service, not embraced in an original contract of transportation.

In regard to what the complainant is in the habit of doing to accom-odate its customers and to facilitate its business, or accustom- to inform the Patterson Trnasfer Company, or what the Patterson Transfer Company does in regard to making out specifications in duplicate, or delivering of goods by that company, under the instructions of the complainant, this respondent is not advised, but he is advised that the whole matter is immaterial, but if the
22 complainant deems it material, then he requires the allegations to be proved.

Further answering, respondent says he does not know whether complainant advertises its goods for sale at Memphis, or holds out its goods for sale at that point, but he does know by what is stated by others, that goods are sold there, and every single sale of goods shipped from Memphis, in fulfillment of an executory contract is a sale of goods at Memphis, and not elsewhere.

Respondent admits the goods are assembled at Memphis for distribution to the various customers of complainant, residing at Memphis and other points throughout the southwestern country, admits all the matters and things set forth in regard to the proceedings that were taken to assess the property of the complainant for taxation. But respondent denies that the proceedings thus taken and the tax collected by virtue of the proceedings taken, was in direct violation of section 8 of article 1 of the Constitution of the United States.

Further answering, respondent admits that the goods which came to Memphis, and were delivered to the Patterson Trnasfer Company, the agent of the complainant, and warehoused by that company, were in original packages, but he denies that they were not shipped to Memphis for sale, but shipped there solely for the purpose of distribution, and in the original packages.

Further answering, respondent says that he is also advised that property is not subject to taxation in Tennessee, while it is in transit from one State to another, and that before it can be subjected to

taxation, it must come to its destination, and there become commingled with the property in Tennessee, but respondent says that he is advised that the bill on its face shows that all of the property shipped in original packages from the manufacturing plants of complainant, when that property reached the city of Memphis, had come to its distination, and when it was then warehoused, it was at rest, and in the warehouses where it was stored, it then became
23 commingled with the property of Tennessee, became a part thereof and subject to taxation.

Further answering respondent says that he denies that section 30 of article 2 of the constitution of Tennessee and the assessment and tax laws passed pursuant to that provision, operates to discriminate between the goods manufactured out of the products of Tennessee and the products of other States, and that consequently the assessment and collection of the tax mentioned in this suit sought to be recovered was contrary to section 8 of article 1 of the Constitution of the United States, because in this pa-tic-lar it was a direct interference with commerce between the States. This respondent is advised that all of the various goods and merchandise of the complainant, warehoused in the city of Memphis, were at rest, and the warehousing of such goods was not part of interstate commerce, and not within the section and article of the Constitution of the United States, relating to commerce between the States and Territories.

And again answering the allegation, this respondent denies that the complainant was not a merchant within the meaning of that term in Tennessee. It denies that it has not now, and never has had, a place in Tennessee where it held out its goods for sale, where it fixed a price upon its goods, or from which it dealt with its customers. Respondent admits that Memphis, in recent years, has become the chief distributing point of the southwestern country, and it was adopted by complainant as the chief distributing point for its goods in the Southwest, and its goods were assembled at Memphis for this purpose, and it was for no other purpose that the goods were so assembled, but on the contrary he avers that they were assembled at Memphis to be warehoused, taken care of, and delivered on sale orders, all of which was executory, until the particular goods were seclected and appropriated and started in transit from Memphis to destination in order to comply with the terms of each executory contract of sale.

Respondent admits the payment of the amount stated in
24 the bill, under protest, to him.

And now having fully answered, he prays that he may be hence dismissed.

Respectfully,

W. H. CARROLL,
JAMES M. GREER,
Of Counsel for Def't.

Agreement of Counsel.

Filed Nov. 26th, 1902.

In the Chancery Court of Shelby County, Tennessee.

AMERICAN STEEL & WIRE CO. *vs.* ROBERT A. SPEED, Clerk of the County Court of Shelby County.	# 12297, R. D.
AMERICAN STEEL AND WIRE COMPANY *vs.* C. D. M. GREER, Revenue Agent; ROBERT A. Speed, Clerk of the County Court of Shelby County, Tennessee, and John H. Alsup, Trustee of Shelby County, Tennessee.	No. 12296, R. D.

Solicitors for complainant and defendants in the above entitled causes do hereby make and enter into the following stipulations or agreement in respect to the above styled causes:—

1st.

All of the proof taken before Robert A. Speed, clerk of the county court of Shelby county, Tennessee, in a matter pending before said clerk, in which C. D. M. Greer, revenue agent, makes application before said clerk to have the property of complainant—American Steel and Wire Company, back-assessed for taxes claimed to be due
25 the State of Tennessee, the county of Shelby and the city of Memphis—be filed in said cause of American Steel & Wire Company against Robert A. Speed, clerk of the county court, being No. 12297 R. D. as evidence in said cause, in so far as the same is deemed by the court relevant and competent, it being understood that all objections to said testimony, except for irrelevancy and incompetency are hereby waived, and the same is to be read at the hearing as if taken in said cause.

2nd.

It is further agreed that either party may take such additional proof in said cause No. 12297 R. D., as may be deemed desirable and pertinent to the issues joined.

3rd.

It is further agreed that objections to the bill in the above cause No. 12296 R. D. for multifariousness are hereby waived and that the cause shall stand upon the docket of the court upon the demurrer of the defendants to the merits and their cross-bill herein and the writ-

ten motion of the complainant to strike the cross-bill from the files until the final decree in No. 12297 and then a final decree shall be entered in this cause conformably to the decree entered therein.

It is further agreed that said cause No. 12297 R. D. shall proceed to a final hearing in the supreme court of the State, and if either party should appeal, in the Supreme Court of the United States, and when the matters of litigation involved in the said suit are finally and ultimately determined, the final judgment shall be binding and conclusive on the parties in the above styled cause No. 12296 R. D.

(4th.)

This stipulation is made for the reason that the principles controlling the two cases are the same, and when a decision is reached in the one case, it will necessarily control the other, and the stipulation is made in order to avoid unnecessary labor and expense.

26 5th.

And, in order to be more specific, it is understood and agreed that the final or ultimate decree in the case No. 12297 R. D. shall be final and conclusive in the case No. 12296 R. D. and upon its production, said case No. 12296 is to be disposed of by the entry of a final decree in pursuance of the stipulations in this agreement.

Made and entered into this *20th* day of October 1902.

PATTERSON, NEELY & HENDERSON,
Sols. for Complainant in the Above Cause.
JAMES M. GREER &
W. H. CARROLL, *For Deft.*

Deposition of D. A. Merriman.

Filed November 26, 1902.

Taken by consent on behalf of the American Steel & Wire Company of New Jersey, in the above styled matter, at the office of Gantt & Patterson, the 4th day of August, 1902, in the presence of Josiah Patterson and W. B. Henderson, of counsel for the American Steel & Wire Company of New Jersey, and Jas. M. Greer and John P. Bullington, of counsel for C. D. M. Greer, revenue agent for West Tennessee.

The witness, being first duly sworn, deposes as follows:—

Direct examination by Col. PATTERSON:

Q. Where do you reside, Mr. Merriman?
A. In Chicago, Illinois.
Q. What business connection have you with the American Steel & Wire Company of New Jersey?
A. I am assistant general sales agent.

27 Q. Do you know whether or not the American Steel & Wire Company is a corporation; if so, in what State was it incorporated?

A. It was incorporated in the State of New Jersey.

Q. And is a corporation?

A. And is a corporation.

Q. In what business is said corporation engaged?

A. In the manufacture of wire and nails, and other products of steel and iron, etc., several other lines of business, transportation and steam ships, etc.

Q. Has it more than one manufacturing establishment?

A. Yes, we have several manufacturing establishments.

Q. Will you state where they are situated?

A. Well, the principal factories are in Pittsburg, Pennsylvania; Cleveland, Ohio, Joliet, Illinois; Anderson, Indiana; and Worcester, Massachusetts.

Q. State whether or not any of the manufactories of said corporation are located within the *the* territorial limits of the State of Tennessee?

A. No, there are none.

Q. All of the goods then, are manufactured without the limits of Tennessee?

A. They are all manufactured north of the Ohio river.

Q. Mr. Merriman, I will have you, in your own way, to state just what connection the American Steel & Wire Company of New Jersey has with the Patterson Transfer Company of Memphis, Tennessee; how long that connection, whatever it may be, has existed, and the nature of it?

A. I think our arrangement with the Patterson Transfer Company is of about two years' duration; I don't remember the exact date, but that is about it. They distribute goods for us to territory in the South and West, that is contiguous to Memphis, Tennessee. Some short time ago, about the time this arrangement was made, we recognized the advantage of Memphis as a distributing point, and the Patterson Transfer Company was selected by us to forward

28 our goods to Tennessee, and to Oklahoma Territory, Texas, Alabama, Mississippi, and all this territory in the West and Southwest. Our goods are shipped into them here principally by barge, almost entirely so. They unload the goods and sort them out as the orders are called for, and ship them on instructions from us, sending us, in due time, the memorandum of such assortments that have gone out, and we, in turn, invoice the goods to our customers.

Q. You say that most of your manufactured products are shipped to Memphis in barges; why is that?

A. Well it is to save freight rates; there is quite a saving in rates in getting goods shipped down here in barges. They get a large quantity at one time, and by reason of that fact we are enabled to distribute from Memphis at some little saving in the rate.

Q. Well, can you at all times of the year, ship by barges to Memphis?

A. You can only ship at certain seasons of the year, when the water in the Mississippi river and its tributaries, principally the Ohio, are at such a stage as to permit barging down the river from Pittsburg to Memphis. If it were not for that possibility, we probably would be unable to use Memphis as a distributing point.

Q. Well, when you are not able to ship your products by barges, how are they shipped?

A. Well, we sort up the stock by shipping it by rail, but there is very little that goes in that way,—only sufficient to sort up the stock from time to time.

Q. Now, state what the Patterson Transfer Company has to do with the sale of the products of the American Steel & Wire Company?

A. They have nothing whatever to do with the sale of our goods. They know nothing about the price, are not authorized to make any quotations, have no authority to receive money for goods they ship on our account, and do not, in that way, transact our business, except making delivery of goods we sell.

Q. Well, please state just exactly how those sales are effected by the American Steel & Wire Company?

29 A. As a rule they are effected by our tra-elling salesman, who is located at Louisville, Kentucky, Mr. William Taylor. He is a regular salaried employé, visiting Memphis frequently, as the occasion of business here demands. He calls upon all our customers, quotes them prices and takes their orders for their requirements.

Q. Have you any other sales agent in the Southwest?

A. We have none that operate in this territory.

Q. In the territory in which these goods are distributed?

A. We have salesmen in Texas.

Q. Well, yes; go on?

A. And Oklahoma and Louisiana. Their orders are sent to us at Chicago, and, for the most part, are shipped out of this Memphis stock.

Q. Well, if I understand you, then, when there is sufficient water in the Mississippi river and its tributaries, to float barges to Memphis, then there are large shipments of your goods by means of barges to this port, anticipating that when the waters go down you will not have the advantage of low rates by means of barges?

A. That is true, during high water we ship very large quantities in anticipation of trade that will come during the next season, and if we do not get it down by barges during this high water, we would be unable to handle the business at all from this point.

Q. Mr. Merriman, what are the character of goods you ship to the port at Memphis; describe them?

A. It consists of barbed fence wire on reels, smooth wire in coils or bundles, fence staples and nails in kegs.

Q. Now please state how these goods are shipped from the manufactories, what are the original packages in which the goods are consigned to Memphis?

A. They are consigned to Memphis and are shipped out of Memphis in precisely the same condition that they are produced at the mill; the barbed wire just as it comes from the machines on the reels; the smooth wire in the original coils or bundles, as
30 produced at *at* the mill, and the staples and nails in full kegs of one hundred pounds each, as they are packed at the mills.

Q. So the nails and wire are shipped,—these are the original packages in which they are shipped at the initial point?

A. Yes, sir.

Q. How are they shipped from Memphis?

A. They are shipped from Memphis in original packages, no bundles or kegs are broken; nothing less than the original packages are consigned to any point or to anybody.

Q. Now, please state in your own way whether or not these goods are sold generally before they are shipped to Memphis, and if so, on what kind of contracts, and if you have a form of contract on which they are shipped please make it Exhibit A to your deposition?

Mr. BULLINGTON: This question objected to because leading the witness, the witness never having said that the goods were sold before they were shipped to Memphis.

A. It is the custom of our company to make contracts with our customers covering stated periods. The customer contracts for a certain tonnage of goods, for instance one thousand or two thousand kegs of nails, one hundred tons of barbed and smooth wire and staples. (We give them a certain period in which to specify for the goods.) That is to say, what particular sizes and kinds they want. We have contracts all the time with jobbers all through this territory made by our travelling salesmen, and some of them made direct with our general sales office in Chicago. The paper I hold in my hand is the form of this contract and I herewith file the same marked "Exhibit A" to my deposition.

Q. State whether or not these contracts with the customers of the American Steel & Wire Company are made before or after the time the goods are shipped from the manufactories?

A. As a rule they are made before the goods are shipped from the factory, and it frequently happens that we have a great many more goods sold for delivery from Memphis than we are able to furnish for them, and it is necessary to wait until the goods can be
31 produced and shipped from the factory to order before they can be assorted and re-forwarded by the Patterson Transfer Company.

Q. So the goods are often sold before they are manufactured even?

A. I should say that in a much larger majority of the cases they are sold before the goods are manufactured; until quite recently that has been the case.

Q. Well, what time is usually taken by the American Steel & Wire Company for the delivery of the goods in these contracts?

A. Well, the customary time is sixty days from date of sale of

contract; although we have, in some cases, given as long as four months.

Q. Now, you have said something about specification in a previous answer; state exactly what you mean by specifications?

A. When we accept a contract, the customer has the time mentioned, either sixty or ninety days, whatever the time may be agreed upon, in which to take out the goods contracted for, and he has the privilege of saying, if the contract be for nails, whether he will take them all in ten pennies, or all in twenty pennies or half of each, or in different sizes, a he may prefer. He has also the privilege of selecting his kinds of barbed wire, and I will add, that usually depends on the kind he sells.

Q. When is the price fixed?

A. The price is fixed at the time the contract is made, and runs through the life of the contract, until the quantity is taken.

Q. And are they paid for at that price?

A. Yes sir.

Q. Well, now, assuming that a customer has made a contract with the American Steel & Wire Company in the form of Exhibit A to your deposition for a certain quantity of wire or nails, then if he wants, within the period or life of the contract, any part of the goods delivered, explain just how that is accomplished?

A. He writes an order for this certain specification, addressing it to the American Steel & Wire Company, and delivers it to
32 the Patterson Transfer Company in duplicate. They file the order and send us, either the original or duplicate order, it matters not which, with the receipt for the goods so shipped, and we invoice from Chicago to the customer. This, of course, applies only to Memphis jobbers, as a matter of accommodation to them, and to save the delay of sending the order first to Chicago, because that would consume two days' time. In the case of a jobber outside,—Texas, Arkansas, Louisiana,—the order is sent to us in Chicago and the shipping instructions sent to the Patterson Transfer Company who ship the goods in our name and send the shipping documents to us and we invoice the goods directly to the customer.

Q. When these goods are shipped to Memphis, how are the bills of lading made out?

A. The goods are shipped to the American Steel & Wire Company, Memphis, Tenn. in care of the Patterson Transfer Company.

Q. Now, going back to the matter we had in hand; in order to get the gist of the matter I will put the question this way; assuming that a customer here, J. T. Fargason & Company, had made a contract for the delivery of a thousand kegs of nails and five hundred tons of wire within sixty days, at a price named in the contract; now, suppose that ten days after that contract was made J. T. Fargason desired a part of the goods delivered; what would be the method they would pursue in order to have the goods delivered?

A. Well, if they wanted five hundred kegs of nails delivered on that contract, they would write out specifications for the assortment and send these specifications in duplicate to the Patterson Transfer

Company, addressed to us, I mean addressed to the American Steel & Wire Company; they would fill the order and send one of the orders to us with a receipt attached, showing delivery of the goods; we would then invoice direct from our Chicago office direct to J. T. Fargason & Company at the price agreed upon in the contract and would charge the tonnage delivery to them in that instance, against the contract, leaving the balance as still due.

33 Q. Then, if I understand you, if a customer here in Memphis makes a contract such as you have described, and wanted a delivery of a part of the goods, he would write a letter to the American Steel & Wire Company at Chicago, and a duplicate of that letter in which he would specify the kind of nails and the kind of wire that he desired delivered?

A. Yes.

Q. And the Patterson Transfer Company would then deliver from the warehouse here to the customer the amount of goods specified in that letter, and attach the dray receipt of the customer to either the original or duplicate letter of specification and forward that to the Chicago house, when the Chicago house would make an invoice of the goods and send it directly to the customer.

A. That is true; that is the case.

Q. That is the method in which they are done?

A. That is the method.

Q. And at other points than Memphis, say Paris or Dallas, Texas, or Jackson, Tennessee, or Columbus, Mississippi, or Vicksburg, Mississippi, or Baton Rouge, Louisiana, or Little Rock, Arkansas, where a customer has made a contract such as shown by Exhibit A, and then wanted, during the life of the contract, all or a part of the goods delivered, they would make up a letter of specifications and forward that to the Chicago house?

A. That is right.

Q. And if the house at Chicago desired to make delivery of the goods from Memphis, they would direct the Patterson Transfer Company to make the delivery and would send the customer the invoice as in the previous case?

A. That is right.

Q. Now, suppose that a customer desired to make, not a time contract like Exhibit A, but to make a purchase of wire or nails at once, to be paid for at the current price; now how would that transaction be carried out with a customer here in Memphis, or with a customer elsewhere than Memphis?

34 A. Well, if the customer wants to buy for immediate delivery, there is no necessity for covering it by a contract, because he gives the specifications in hand for prompt delivery, and are agreed upon, and all it is necessary to do is to handle the order just as a contract in itself, and that order is handled just the same way as specifications would be handled on one of those contracts.

Judge GREER: That don't tell exactly what Col. Patterson asked.

Col. PATTERSON: Well, can I tell him what I understand it to be?

Judge GREER: I can't object.

Q. Well, if I understand you, then if a customer of the American Steel & Wire Company should desire five hundred kegs of nails for immediate delivery, then the price they agreed upon, he would write a letter specifying the goods he desired delivered in duplicate, addressed to the American Steel & Wire Company and would deliver the letter to the Patterson Transfer Company and that company would deliver as in other cases, the goods, and send the duplicate letter with the dray receipt attached, to the house at Chicago, and the invoice would be sent as in the other case?

A. Yes, that is true in most cases, and in all cases within my recollection our travelling salesman, Mr. Taylor, in instances of that kind, mails, himself, direct to our office, a copy of the specification and writes on the bottom, "I have given these specifications to Patterson Transfer Company for delivery." Now let me add right there, that Mr. Taylor knows who our customers are here in good standing, and so does the Patterson Transfer Company, because we have advised them to that effect. They know who are our customers to whom we sell, and to whom we do not care to sell.

Q. Well, Mr. Merriman, is there any difference between your customers and other merchants here in Memphis in your dealings?

A. Why, yes, there is. We have certain customers whom we are selling regularly, from whom Mr. Taylor receives unusually good treatment in the way of favoring him with orders, and naturally we consider that class of trade our best customers.

35 Q. Well, state whether or not any business man, merchant in Memphis who wants to buy nails or wire from the American Steel and Wire Company, can make out specifications as you have described, and buy the goods?

A. He cannot, no sir.

Q. It is only the men, then, who are the customers of the company?

A. It is only the men who are the customers of the company, and only those whom we sell and whom we have an agreement with as to the price and terms of delivery.

Q. And if a firm here in Memphis, or elsewhere, who was not a customer of the American Steel & Wire Company, should make out specifications embodoied in a letter in the manner you have described, addressed to the company and delivered to the Patterson Transfer Company, state whether or not the goods would be delivered?

A. The goods would not be delivered, even though they might offer double the value in cash, without the Patterson Transfer Company first got the authority of the American Steel & Wire Company to deliver such goods.

Q. What knowledge or means of information has the Patterson Transfer Company in reference to the price at which you sell these goods?

A. None whatever, as far as the company is concerned. They

have never inquired, to my knowledge, and we have never informed them, because it is not their business to know it. Their pay is so much per hundred pounds for what they receive and deliver, and that is all the interest they have in the transaction.

Q. State whether, or not, you know of a single instance in which the Patterson Transfer Company has sold to a customer the products of the American Steel & Wire Company?

A. I do not know of a single instance, never heard of one, and do not believe any has ever occurred.

Q. State whether, or not, the American Steel & Wire Company has an office in Memphis, or elsewhere in Tennessee?

A. We have no office in Tennessee, in this State.

36 Q. State whether or not the American Steel & Wire Company has any agent or representative resident in this State, who makes contracts for the sale of its goods?

A. Mr. William Taylor lives in Louisville, Kentucky.

A. I mean resident in Tennessee?

A. None that I know of. I think we have a salesman that perhaps visits some of the small trade, but we have no resident salesman here.

Judge GREER: This question and answer objected to on the ground that agency is a blended question of law and fact, and it is not competent for the witness to answer as to the conclusion of law upon the fa-ts or of employment by anyone, since this — a matter for the court's determination on a trial.

Q. Mr. Merriman, do you know what per cent. of the products of the American Steel & Wire Company which are consigned to the company at Memphis, is sold to Memphis merchants, and what per cent. is sold elsewhere?

A. About ten per. cent is sold to Memphis jobbers; the balance is distributed to the western and southern territory contiguous to this market.

Cross-examined by Judge GREER:

Q. Your place of residence?

A. Chicago, Illinois.

Q. And there, you are——

A. Assistant general sales agent ef the American Steel & Wire Company of New Jersey.

Q. As such you simply have an office there?

A. Simply have an office there.

Q. And does the American Steel & Wire Company there keep a stock which is subsequently shipped to Memphis?

A. Well, it keeps a small stock in Chicago; the stock shipped to Memphis comes principally from mills outside of Chicago.

37 Q. And on this stock of goods thus shipped to Memphis by the American Steel & Wire Company it does not pay a tax to the State of Illinois?

A. Well, if the goods are not manufactured in Illinois they do not pay a tax there. The American Steel & Wire Company pays a tax, though, in the State of Illinois.

Q. Pays a tax?

A. Yes, indeed; no question about that.

Q. Of what description?

A. I could not say positively, because my jurisdiction is sales agent, and their officers look after that, but I happen to know they pay a tax.

Q. Now, you have spoken of having a contract of some description with the Patterson Transfer Company in the city of Memphis, is that contract a written one?

A. Well, of my own personal knowledge, I do not know. I think, though, it is rather in the form of an understanding. They quoted us certain rates for handling our goods, which was satisfactory to us, and we ship goods in here and they perform their services and get their pay.

Q. Do I understand you to say that you do not know whether the American Steel & Wire Company has a written contract with the Patterson Transfer Company?

A. I am not positively informed on that subject.

Q. How long has there been any contract to your knowledge, between your company, and by your company hereafter, or by you, I shall mean the American Steel & Wire Company—and the Patterson Transfer Company?

A. The arrangement that we are working under has been in effect for about two years. I don't know the exact date.

Q. It may have been a period of about two and a half years?

A. Yes. You know, Colonel, about how long it is.

38 Col. PATTERSON: I think about two years and a half; that is my information.

Q. And all of the goods sold in what you call the Memphis territory, are shipped here to the American Steel & Wire Company?

A. Not all of them. Some of them we ship direct from our mills. Perhaps we might not have the particular kind of goods called for in Memphis, but where we have the kind of goods called for in Memphis as a rule and with few exceptions, we try to ship them out of this stock.

Q. This, as I understood your direct-examination, is the distributing point from which you ship to customers a large part of goods sold by the American Steel & Wire Company.

A. Yes, we recognize in Memphis a very good distributing point, by reason of the fact that we can ship goods in here in barges in large quantities, get them down the river from Pittsburg at a cheap rate, and then at a minimum cost have the Patterson Transfer Company assort those goods to fit our orders and ship them out wherever the demand may be.

Q. Now, Mr. Merriman, there is only a short period of each year in which the waters of the different rivers over which your goods will pass, permit you to ship by barges, is it not?

A. That depends entirely on the season. This season has been an unusually wet one all over the country, and the result is the facilities this season have been better than the average.

Q. Can you state what is the average time of each year when goods can be shipped by barges from Pittsburg, or other points to Memphis, by the American Steel & Wire Company?

A. Well, that is a matter that I would not like to say positively, because I have not got the exact dates, but I think that ever since la-t December or January, until the present time, with possibly a few intervening days or weeks, the facilities have been very good for shipping.

39 Q. You have said that this has been an unusually wet season; I am asking about the average condition of waters, so that you could ship by barges,—and by you, I wish to repeat I mean the American Steel & Wire Company?

A. You say the average condition; you mean the average—I don't understand that average condition.

Q. My question is, as I understand it, the substance of it is, this has been an unusually wet season and you have answered about what you think is the time you could have shipped this year; on other years it does not amount—I will put it then in a definite form—to as much as three months in a year.

A. It will amount, I will say, to as much as six months in the year, not consecutive months, however; I think that is the minimum.

Q. Now, it is the intention of your company to avail yourself of the condition of the water to ship as much stock as you think your sales will justify, is it not?

A. Well, our experience has been that we have always been able to sell a great deal more than we could ship. We have sold and have made contracts far in excess of our ability to get the goods down here.

Q. But when the goods are actually shipped, they have frequently not been already sold; isn't that a fact?

A. I would not like to say, that it has frequently been the case.

Q. Then it has been the case; I will change my question.

A. Well, it might have been; there have been some few tons of stuff on way here that had not been sold; I would not like to say positively because I have already explained, these contracts here are not specified until the man wants the goods; therefore we can not say exactly what he is going to take.

Q. Who pays for the storehouse in which your goods are placed, when they come to Memphis?

A. Who pays for the storehouse?

40 Q. Rent for the storehouse?

A. I don't know.

Q. Who owns the goods shipped by you to Memphis to be delivered to yourselves?

A. The American Steel & Wire Company, of New Jersey.

Q. And when they reach Memphis they belong to your company, the American Steel & Wire Company?

A. That is right.

Q. They only become the property of your customers who buy them when they are delivered to your customers; is not that correct?

A. Yes, that is true.

Q. What is the average value of the stock of goods that you keep on hand in the city of Memphis?

A. Well, I couldn't say that off-hand, because I have never figured it up.

Q. Let me state to you that in the bill recently filed by your company in the United States circuit court, at this place, the statement is made that the fair value is about one hundred and two thousand dollars; giving you that as a statement, what will you say?

A. I think that is a very fair and liberal valuation.

Q. Under the taxing laws of Tennessee, if you are held liable at all, and by you I mean your company, of course—the rule is to take the largest amount of stock you have on hand at any one time, the smallest amount of stock you have on hand at any one time, divide by 2 and thus arrive at about the average value of the stock; I wish to ask you now whether with that information in your mind you will tell me about what is the average value of that stock.

A. Well, I can't tell you the average value of the stock, because I have no definite knowledge of what the maximum and minimum amount was, but I am quite satisfied that several months during the year the value would be considerably less than one hundred and two thousand dollars, and possibly it may run more during some other periods.

41 Q. Now, Mr. Merriman, you are down here and are giving your evidence because of the citation which has been served on the Patterson Transfer Company as agent of the American Steel & Wire Company, to appear before R. A. Speed, clerk of the county court, to show cause why the American Steel & Wire Company should not pay a merchant-' tax, are you not?

A. Not entirely so. I came down here to consult with our attorneys, and did not come here with the sole intention of making a deposition. I didn't know whether I would make one or not; ain't that right, Colonel?

Col. PATTERSON: That is right.

Q. I was not present at the beginning of your deposition, but take it, of course, you are testifying before R. A. Speed, clerk, or rather for the purpose of having your testimony read before R. A. Speed, clerk, on this citation; is that correct?

Col. PATTERSON: The caption shows that, Judge.

A. I just wanted to be honest with you and say that I didn't know what I was coming down here for. I just came down to look into the case and do whatever was necessary.

Q. Well, Mr. Merriman, it is a fact, is it not, that very frequently merchants in Memphis, desiring to purchase goods belonging to the

American Steel & Wire Company, make out an order on one day and deliver that to the Patterson Transfer Company and have the goods of the American Steel & Wire Company delivered to them by the Patterson Transfer Company the next day?

A. If those jobbers have the contract with us, or have previously arranged with our Chicago office, or with our travelling salesman for the purchase of the goods, it may be possible for them to specify for goods and get delivery the following day; but I have known of many cases where they have been unable to get delivery for approximately thirty days.

Q. Suppose, Mr. Merriman, that they had not already ordered, already made a specification for any of these goods but were
42 customers who were in the habit of buying from your company, is it not a fact that they could frequently go to the Patterson Transfer Company, deliver to them an order, send the price to Chicago, and get the goods the next day?

A. No buyer or jobber in this market can get goods from the Patterson Transfer Company without our authority. As I stated once before, we have some established, recognized customers here, and general instructions have been given the Patterson Transfer Company to recognize their orders. Moreover,. the Patterson Transfer Company are advised, both by our Chicago office and our travelling salesman, of the details of our business arrangements; I mean of our sales to these gentlemen, and unless the Patterson Transfer Company have general or specific instructions to deliver goods to these recognized and mentioned buyers, no goods will be delivered by them to those parties.

Q. What does the Patterson Transfer Company get to act for your company?

A. I can't say the exact figures, but they get a certain amount per hundred pounds for handling our goods. I think it is something like,—it varies from a cent and a half to two cents a hundred.

Q. Mr. Merriman, isn't it a fact that you don't know, and you were not present when any contract was made between your company and the Patterson Transfer Company?

A. I was present at the time when the Patterson Transfer Company and our company discussed the question of compensation, and heard their proposition, but I didn't make a note of it and I can't say positively.

Q. And you were not acting for the American Steel & Wire Company in making any contract with the Patterson Transfer Company?

A. Well, I was a party to the discussion.

Col. PATTERSON: As a representative of your company?

A. Yes, I was a party to the discussion in our office, but I didn't make any contract; and as I told you, I think the proposi-
43 tion was made by the Patterson Transfer Company to attend to our business for a certain amount, and we just simply said it was all right.

Q. Now, Mr. Merriman, you have stated that the American Steel

& Wire Company ship goods intended for customers in what we will call the Memphis territory, directly to the Patterson Transfer Company; how does the Patterson Transfer Company know whose goods they are; what books are kept by your company; what books are kept by the Patterson Transfer Company to show the goods belonging to Smith, Brown and Jones elsewhere?

A. I stated the goods were shipped to the American Steel & Wire Company, Memphis, Tennessee, in care of Patterson Transfer Company. Now, when shipments are made by the Patterson Transfer Company they keep, at lea-t I assume they keep a record of the tonnage.

Q. Just state what it is, within your knowledge?

A. Of course I am not employed by the Patterson Transfer Company and naturally I don't understand their system of book-keeping.

Q. What is to prevent your shipment direct to a merchant in Memphis, where he has bought goods from your company?

A. Nothing whatever; we are at liberty to do that whenever we choose it; and I think, have done so, but in very exceptional cases.

Q. Your rule is to ship a lot of goods or material to the American Steel & Wire Company, and those goods or stock is taken charge of when it arrives here and hauled by the Patterson Transfer Company to their warehouse, and from that point customers have their goods distributed to them in Memphis, or reshipped to some other point?

A. That is right.

Q. This stock of goods that you keep on hand has been uniformly kept on hand for the last two and a half years, or as you have stated now, a little over two years, in this warehouse?

A. Been uniformly kept; you mean kept there all the time?

Q. Yes.

A. I think it has.

44 Q. Now, when you ship from Pittsburg, we will say; or, if I understand you, you ship from different points your goods?

A. Principally Pittsburg.

Q. Well then when you ship principally from Pittsburg your goods to your own order, at Memphis, you do not charge any freight to a customer who buys in Memphis, do you?

A. We certainly do, because the price in Memphis is higher than the price in Pittsburg.

Q. But you render no bill to a customer for a freight charge?

A. No, it is shown in the price.

Q. It is only in the price?

A. It is in the price; yes.

Q. That is to say, Mr. Merriman, if I understand you, and I am anxious to do so, honestly and fairly.

A. That is right; I am the same way.

Q. A car load of nails in Memphis is worth more than a car load of nails in Pittsburg.

A. It is, yes, sir.

Q. From your general knowledge and experience as a business man, that is true about dry goods in Boston?

A. Well, I think it is pretty much true all over the country, that where goods are produced——

Q. And yet—go back more directly to my question, because I don't think you are trying to avoid it, and yet I don't think your answer is as candid as my question is intended to be; and this is not intended to be discourteous, I will say also; you render no bill for freight against Thomas, Barnes & Miller, whom I happen to know are customers of yours, when they get goods here out of this warehouse?

A. No, we do not.

Further cross-examined by Mr. BULLINGTON:

Q. Mr. Merriman, I would like for you to designate by items
45 the products, from the commencement of your use of the Memphis office, which you have shipped to and from the Patterson Transfer Company's warehouse, giving the dates of the several shipments of such products, the point from which each one was shipped, and the person or persons to whom the same was consigned, and annex copies of the several bills of lading to your answer as exhibits to your deposition?

A. I can't say that I can do that; I don't think that it would be possible for me to do it.

Q. We will call on you for those copies and insist that they be annexed to your deposition. And I will ask you further to give the dates of the several sales of such products made, from the beginning of the use of the Memphis office to the present time, and the dates of the delivery orders, to whom they were given, and I will ask you to file specimens of several of such orders, and to include among them all orders where sales were made to Memphis concerns?

A. We will gladly file originals, if possible, and if not, copies of all duplicate contracts and orders that we can find. I can't say that we can do that in every case, because old records are destroyed. However, I think there will be enough for your purpose.

Q. How far back do you keep records?

A. Well, I couldn't say definitely. When a contract is completed and out of the way, there is no real incentive for us to keep it. In a corporation like ours old records would require a big warehouse, if we kept everything that came in.

Q. I will ask you further to give the amount of each sale of product distributed from Memphis, and the name of the person or persons to whom they were sold?

A. That is covered by your previous question, isn't it?

Q. I believe it is. I will ask you further to enumerate the items showing the products of the American Steel & Wire Company now in the warehouse of the Patterson Transfer Company, of Memphis, Tennessee. I will ask you to give the names of the persons to whom those products are now sold, and the date when each sale was made?

A. Well, we have an assortment of barbed wire, smooth wire,

st-ples, and nails there, and we have contracts at the present time with several jobbers in Memphis, with jobbers in the great Southwest, including Texas, Louisiana, Oklahoma, Mississippi, and other points in Tennessee. I cannot mention them now off-hand.

46 Col. PATTERSON: Counsel for the American Steel & Wire Company here states that the contracts referred to by the witness are living contracts and unexecuted at this time, and consequently to file them as exhibits to the deposition, or to produce them before the clerk of the county court, would be a matter of very great inconvenience, but if counsel desire to go to the office of this company and inspect these contracts, they are at liberty to do so.

WITNESS: I want to add, there Colonel, that we consider that as very confidential,—private affairs; we would not want to have matters of that kind open to our competitors.

Q. Then I will ask you if there are living contracts, and if you object to filing them as exhibits to your deposition, that you produce copies of those contracts, and with the copies produce the original for examination of counsel for the defendant?

A. Well, the information that we desire to keep from the public would be public, probably, just the same as if we filed the copy.

Mr. BULLINGTON: Counsel for the defendant asks and insists on the production of these copies, and of the originals for examination that is, of the living contracts of the stock now in the warehouse that is disposed of.

Col. PATTERSON: In reply to that, counsel for the American Steel & Wire Company states that if counsel for the revenue agent desire, for the purpose of this litigation, to make an examination of those contracts for any purpose, with the understanding that the business of the company would not be made public, but information was only desired for the purpose of this law suit, no objection could be made, but it would be impossible for this company to take the living contracts of its office and make them exhibits to this deposition, without great injury and harm to its business, and for this reason witness is advised not to produce the same.

Q. Then, I understand, Mr. Merriman, that you refuse to produce either the original or copies of the contracts, the items of
47 which make up the present stock of goods now held in the warehouse by the Patterson Transfer Company?

A. Yes, that is right.

Re-direct examination by Col. PATTERSON:

Q. — Merriman, you stated on your cross-examination that these goods could be shipped directly to the customers instead of being shipped to Memphis to the order of the American Steel & Wire Company, in care of the Patterson Transfer Company, and distributed to the customers in the manner you have described in your deposition;

now state why it is that methods adopted was preferred to shipping directly to the customers?

A. You mean the method adopted of carrying the stock here and then consigning it?

Q. Yes.

A. Well, it was principally because of the fact that we recognized Memphis as one of the best distributing points in the South for the western and southern trade. It enables us to reach our customers in all cases as cheap as we can direct from the mills, and sometimes a little less, and we have the other benefit of being near to the point of consumption, which is a considerable item in our line of business. Ours is a very large business; we handle a very large product of different kinds of goods during the year, and if we can have these assembled here at one point from two or three different mills, it enables us to ship our goods out more promptly to satisfy our trade, and sometimes save a little in the freight charges. If, however, the conditions surrounding our doing business at this point, are charged so as to make it unprofitable for us to do business here, we could go back to the old means of shipping direct from our mills to the respective destinations of our customers as we did before we carried the stock here. And I want to add that Memphis jobbers have been very urgent in their requests for us to carry this stock here, and they are largely benefitted by this arrangement.

48 Judge GREER: This question and answer is objected to because the question called for an opinion upon the part of the witness, and his reply becomes an argument, and principally also is hearsay statements, and therefore the question and answer are incompetent and irrelevant.

Q. Now you say the freight is added in the price of the goods; is that correct?

A. There is no stipulated amount added in the price of the goods; there may be times when no freight is added in the price of the goods, it depends upon market conditions.

Q. But if I understand you, Mr. Merriman, these goods, whether sold at Memphis or elsewhere, are sold at a price at which they are to be delivered to the consumer; that is correct, is it?

A. That is the idea. The price includes the question of freight charges, whatever they may be.

Q. In other words, when these contracts which you have described in your examination in chief, are entered into, time contracts, to be filled within sixty or ninety days,—whenever the customer orders the delivery of the goods under that contract, such a contract they are delivered to him free of freight charges?

A. Free of freight charges; that is right.

Q. And he receives them at the depot; it is a free delivery at the depot?

A. Free delivery; that is right.

Re-cross examined by Judge GREER:

Q. Mr. Merriman, that is true of every other merchant, so far as you know, that sells goods in the city of Memphis?

A. I have no knowledge of how other people sell their goods.

Q. When one in Mississippi buys goods of the American Steel & Wire Company, which have been sent to the warehouse here and then are shipped to that customer, we will say in Mississippi
49 or Alabama, or Arkansas, or Texas, the freight is charged from Memphis on to that customer, is it not?

A. No, I don't think that is the case. If we sold and delivered goods to a party in Mississippi or Alabama or Texas, the price at which we sold those goods would include the freight charges and the customer would have nothing to do with that whatever; our company alone would be responsible for the freight charges.

Q. But you would charge him more than you would a man in Memphis?

A. Why certainly, that is a plain business proposition.

Q. And the object in charging him more would be to cover the charges of taking out of the warehouse here, hauling to the depot, shipping from the depot, or from the steamboat landing, to that customer, these goods?

A. Well, it might or might not cover that; it might not be based on Memphis, whatever; it might be based on the price ruling at some other point but shipped out here because we have this assortment ready for prompt delivery, and because of the other advantages already enumerated.

Re-direct-examination:

Q. In order to have a better understanding, I will assume this case; suppose that a customer residing at Little Rock enters into a contract with your company, under which goods are to be delivered, say within sixty days, and he writes a letter to your company specifying the quality of the goods that he wants, as you have already described in your deposition, and then you direct the Patterson Transfer Company to ship the goods so specified, would those goods be delivered to him at the price named in his contract, or would they be delivered to him with the price and the freight from Memphis added?

A. They would be delivered to him at the price named in the contract.

50 Re-cross-examined:

Q. But the price named in his contract, just as you have stated before, your company would intend to cover the extra freight charges?

A. Well, it might, or it might not cover it; that depends on competition.

And further this deponent saith not.

Judge GREER: In view of the fact that the witness was sworn before he was examined and his testimony taken in shorthand by a competent stenographer, counsel for revenue agent, on the citation, waive the signature of the witness to this deposition.

STATE OF TENNESSEE, }
County of Shelby. }

I, Wm. H. Fitzhugh, a notary public, in and for said State and county, hereby certify that the foregoing witness, D. A. Merriman, was by me first duly sworn in said cause to speak the truth, the whole truth, and nothing but the truth. Witness my hand and seal natorial at Memphis, this 11th day of August, 1902.

WM. H. FITZHUGH,
Notary Public.

EXHIBIT "A" TO D. A. MERRIMAN'S DEPOSITION.

Office of American Steel and Wire Company.

Trade mark. Memorandum of sale.

Universally registered.

CHICAGO, ILL.

—— —— hereby purchases and agrees to receive from the
51 American Steel and Wire Company, a corporation, and the said steel and wire company hereby sells to —— ——

Quantity and description. ——
Shipments. ——
Price and terms. ——
Remarks: ——

Payment in U. S. gold coin or its equivalent in U. S. currency.

Each month's shipment to be treated as a separate and independent contract, but if the buyer fails to fulfill terms of payment under this or other contracts, seller may defer further shipments until payment is made, or may cancel this contract at his option.

The seller may decline to make deliveries on this contract, except for cash, whenever the seller for any reason shall have any doubt as to the buyer's responsibility, and so advise the buyer, whereupon the buyer shall have the privilege of satisfying the seller of his responsibility, and when the seller is so satisfied, then deliveries shall be made or renewed, as per above terms.

Strikes, differences with workmen, accidents to machinery, or other contingencies beyond the control of the seller, to be sufficient excuse for any delay in shipment traceable to such cause.

Within a reasonable time after the removal of such contingency, seller is to complete deliveries as rapidly as possible.

The purchaser shall give the seller specifications of goods covering shipments, not less than ten days before time of shipment.

Accepted. Accepted.

52 The deposition of William Taylor, taken at the same place on the 5th day of August, 1902, and on like conditions, in the presence of Josiah Patterson and W. B. Henderson, of counsel for the American Steel & Wire Company of New Jersey, and James M. Greer, of counsel for C. D. M. Greer, revenue agent.

The witness being first duly sworn, deposes as follows:

Direct-examination by Col. PATTERSON:

Q. What is your name and where do you reside?
A. William Taylor; I reside in Louisville, Kentucky.
Q. In what business are you engaged?
A. As travelling salesman for the American Steel & Wire Company.
Q. How long have you been engaged as travelling salesman for the American Steel & Wire Company?
A. Ever since it was incorporated.
Q. When was that?
A. Between three and four years ago.
Q. In what business were you engaged prior to that time?
A. In the same business with the Consolidated Steel & Wire Company.
Q. How long have you been engaged as sales agent for iron and steel products?
A. About eight years.
Q. In what territory do you operate?
A. At present?
Q. Yes.
A. Kentucky and Tennessee.
Q. How long have you operated in this territory?
A. About eight years; during that time,—during a portion of that time, I covered other territory at the same time I covered this.
Q. Prior to the time the American Steel & Wire Company shipped goods to Memphis, of its own order, in care of the Patterson Transfer Company, what was the method of transacting business in this territory you represent?

53 A. The business was solicited on the same lines in which it is now solicited, but the goods were shipped direct from the mills to the consumers.

Q. State, Mr. Taylor, what were the reasons for conducting the business on a different plan, and on the plan now adopted by storing goods here at Memphis with the Patterson Transfer Company?
A. The principal reason was because by locating here at Memphis we could ship in barge load lots, by water, enabling us to get the goods down in bulk, and also at a much cheaper rate than shipping all rails in carloads. We recognized Memphis as the principal and best distributing point that there was in the South where we could reach by water. Another reason was because in shipping to the South and Southwest from the mills in carloads, it took, in the busy

season, several weeks for a carload of our goods to be transported from the mills to their destination. That necessitated the merchants anticipating the stocks from one to two months ahead, and investing considerable money and running a risk of the fluctuation of the markets. Another reason was that competition was springing up in the South, much nearer the source of consumption than we were, which, of course, under the adverse circumstances under which we were working, would enable this competition to get business against us, probably on an equal basis of price. Therefore, there was a number of reasons for locating at Memphis.

Judge GREER: To this question and answer the counsel for the revenue agent object, on the ground that the witness has not qualified as having any controlling interest in the business of his corporation, so that he could determine its policy or control its business, and because the answer expresses an opinion instead of detailing facts.

Q. Mr. Taylor, of your own knowledge, do you know these were the reasons that controlled the change?

A. Yes sir, I know that they were the principal reasons; there might have been others.

Q. What, if any, competition has the American Steel & Wire Company here in Memphis; state it, if any exists?

54 A. We have the Alabama Steel & Wire Company, at Ensley, Ala.; the Kelly Iron & Nail Company, Ironton, Ohio; the Belfont iron works, Ironton, Ohio; the Ashland nail & iron works, or the Norton iron works at Ashland, Kentucky; and periodically mills located at other points, such as Cuyahoga Falls.

Q. Now, Mr. Taylor, state whether or not any of these competitors of the American Steel & Wire Company enjoy the same advantage which the American Steel & Wire Company acquired by the present arrangement?

A. They do in a modified way. Some of them ship goods by rail, in car load lots, to Memphis, for re-consignment to points where they can gain an advantage in rates by so doing, as shipping direct from the mill to destination. They are shipped by rail to Memphis, not having barge facilities, and goods are placed in storage and sold to the trade, much after the manner of our own. Whether the arrangement is good for the factory or their representatives here I am not qualified to say.

Q. Now, Mr. Taylor, I will have you go on and describe in your own way exactly the method by which the American Steel & Wire Company transacts its business in the territory in which you represent it as sales agent, and more particularly at Memphis; you can go on and give the general course of business and then if there are any exceptions to that general course of business; you can give that and particularize?

A. The general method of soliciting our business is to visit the jobbing points in Kentucky and Tennessee periodically, as a rule, at least twice a month. I solicit the jobbing trade, and if they are in

the market I endeavor to make a contract with them, extending, as a rule, over a period of sixty days, for a specific amount of tonnage in nails and wire. These contracts are forwarded to Chicago and accepted and recorded, and a copy returned to the customer. The customer then has the privilege of specifying for the tonnage named in the contract at his pleasure, provided for the total amount
55 so as to enable us to complete the contract within the sixty day limit. When his specifications are finished for all or part of the contract, the Patterson Transfer Company deliver the goods if they have them in stock. There are some exceptions to that system of getting contracts, where we book for what we call immediate shipment. In a sale of that kind the customer furnishes specifications at the time the order is booked, unless it is arranged otherwise, giving him a margin of two or three days, maybe; there are cases of that sort; and for other reasons we might give him two or three days to look up his stock, but it is an order which we term "for immediate shipment." If the sale is made to the Memphis trade I turn over those specifiations to the Patterson Transfer Company and authorize them to deliver the goods. The goods shipped to the Patterson Transfer Company are shipped by us from the mills and are received in exactly the same condition as they leave the factory. They are delivered to the trade by the Patterson Transfer Company in exactly the same condition in which they receive them from us.

Q. Now, Mr. Taylor, in that connection, I will have you state what are the original packages in which the manufactured products of your company are shipped from the factory, that is, at the initial point of the shipment; in what do they consist?

A. Barbed wire, plain wire, nails and staples. The barbed wire is wrapped on spools; the plain wire is put up in bundles and tied with wire, and all the nails and staples are put in hundred pound net packages.

Q. In what?

A. Kegs.

Q. Then, if I understand you, the reels on which are wound the barbed wire, the coils of smooth wire tied with wire, and the kegs containing the nails and staples, constitute the original packages which are shipped from the manufactories?

A. Yes, sir; they do.

56 Q. That is the form in which they are shipped at the initial point?

A. Exactly.

Q. In what form are they delivered?

A. In the exact form and condition in which they are received.

Q. In what form are they sold?

A. In the same form as they are shipped from the mills.

Q. In what form are they delivered to the customers?

A. In exactly the same form as they leave the factories.

Q. Now, if I understand you correctly, Mr. Taylor, when you, as sales agent, call upon a customer of the American Steel & Wire

Company you ascertain the amount of goods that he wants at sixty days' delivery?

A. Yes sir.

Q. And the price being agreed upon, then a written contract is entered into, by which he agrees to take so many goods within sixty days at a certain price?

A. Yes, sir.

Q. And you give him the privilege, at any time during the sixty days to specify the kind of goods that he wants under the contract, and they are delivered to him and the contract is to that extent, filled and discharged?

A. That is it exactly; yes sir.

Q. When these contracts are entered into they are forwarded to the home office at Chicago?

A. Yes sir.

Q. They are there recorded and a copy of the contract is sent to the customer?

A. Yes sir.

Q. Now, who is it that makes out these specifications, the customer or you?

A. The customer.

Q Then if at any time during the sixty days the customer desires delivery of any part of the goods purchased under contract, he
57 specifies in a letter directed to the American Steel & Wire Company the amount of goods he wants delivered?

A. Yes sir.

Q. And the kind of goods?

A. Yes, sir.

Q. Is that letter made in duplicate or not?

A. From the Memphis trade it is made in original and duplicate.

Q. Well, to whom are these letters delivered in the Memphis trade here?

A. Some are forwarded direct to the Chicago office, some are forwarde- to me at Louisville, and some are delivered to the Patterson Transfer Company.

Q. Now, if the specifications are forwarded to the Chicago office, then how is the order filled.

A. The home office fills up what they call an order blank, which is really a copy—writes up a copy of the specifications on our regular order blank and forwards that to the Patterson Transfer Company, with authority to deliver the goods to the customer.

Q. Now, in event the specifications are sent to you, then how is it?

A. Then I make a copy in duplicate and forward them to the Patterson Transfer Company, and authorize them to deliver the goods.

Q. Well, suppose instead of that, that they make application for delivery of the goods to the Patterson Transfer Company, then what is the process?

A. If the Patterson Transfer Company know that those specifica-

tions are from one of our regular customers, they deliver the goods and send the receipt for them with the duplicate from the customer.

Q. Duplicate specification?

A. Yes sir, from the customer—where they furnish the original and duplicate—to the Chicago office, from which point the goods are regularly invoiced to the customer.

58 Q. Suppose a jobber at Memphis, or elsewhere, should make out specifications for goods to the American Steel & Wire Company, such jobber wanted to buy, and deliver the specifications to the Patterson Transfer Company, what would be the result?

A. The Patterson Transfer Company would not deliver any goods to a concern of that sort without getting authority from the Chicago office.

Q. State whether or not the Patterson Transfer Company make sales of goods?

A. The Patterson Transfer Company do not, nor have they ever made any sales of our goods since the opening of the Memphis warehouse, or since the time we commenced to carry a stock in Memphis.

Q. Well, what knowledge have they of the prices at which the goods are sold?

A. Absolutely none.

—. State what connection the Patterson Transfer Company has with the fixing of the price or making the sales of the goods?

A. None whatever.

Q. Are you the only agent representing the American Steel & Wire Company in the territory you have described?

A. Yes sir.

Q. Mr. Taylor, I show you a paper and ask you what it is and will have you file it as "Exhibit A" to your deposition.

A. This is a blank contract for wire nails. This form of contract is used in all cases where that contract with a customer for a period of sixty days; and I herewith file it marked "Exhibit A" to my deposition.

Q. Then, as I understand you, Mr. Taylor,—in case a customer of the American Steel & Wire Company is in haste and wants to buy goods from your company for immediate delivery, what is your method?

A. We would accept his specifications for whatever amount he wanted and book a delivery of the goods. In that case this form of contract would not be used.

59 Q. Well what would be done?

A. He would write up his specifications, and if he gave them to me I would submit them to the Patterson Transfer Company for delivery. If they were from one of our regular customers, and they submitted the specifications to the Patterson Transfer Company, they would deliver the goods and send the customer's receipt from them to Chicago, from which point they would be invoiced. That would dispose of the transaction.

Q. Where are the invoices made out?
A. At Chicago.
Q. To whom are they sent?
A. Direct to the customer.
Q. What has the Patterson Transfer Company to do with the invoice, or with invoicing the goods?
A. Nothing whatever.
Q. Mr. Taylor, have you ever, at any time, made a sale of goods for the American Steel & Wire Company here at Memphis, that was exceptional, and if so, state to whom and under what circumstances?
A. Yes sir; I remember several months ago I made a sale to a retail house, the Matt Stewart Hardware Company, which was exceptional in this respect; that we don't solicit the retail trade, but as the Matt Stewart Hardware Company was acting as our agents for our woven wire fence, as an accommodation to them I sold them one car load of nails.
Q. In what kind of packages?
A. The original packages, exactly as they left the mill.
Q. And exactly as you sell to the wholesale and jobbing trade?
A. Yes sir.
Q. Well, what did you do when you made this sale; how was it perfected and how was it carried out?
A. I took their specifications and delivered them to the Patterson Transfer Company, advising them that this was an exceptional case, and authorized them to deliver the stock, after having taken
60 the matter up with the Chicago office in regard to the credit of the Matt Stewart Hardware Company.
Q. What did the Patterson Transfer Company have to do with the sale?
A. Nothing at all.
Q. State if there are any other exceptional cases with Matt Stewart, or any one else?
A. In which we have sold direct?
Q. Or indirectly, either?
A. Well, there was another case subsequent to this, with the Matt Stewart Hardware Company, where I again found them in the market for a car load of nails, but my previous action had been criticised by some of our large customers in Memphis and I judged it judicious to turn the Matt Stewart business in some other direction, rather than sacrifice our heavier trade with the larger jobbers. I advised Mr. Stewart that we had a contract with the Memphis jobbers at a lower price than I could make him, and asked if he was willing to place his order with these jobbers in case he got a better price than my own. He advised me that he was. I then conferred with our customer and asked him if he would shave my price to the Matt Stewart Hardware Company. He agreed to do so. Mr. Stewart then furnished me with specifications for the order, which I submitted to my customer first, had him make a copy of them and I delivered a copy to the Patterson Transfer Company for delivery to our customer, who then turned the goods over to the Matt Stewart

Hardware Company. As far as my recollection goes these are the only two transactions we have ever had with the Matt Stewart Hardware Company.

Q. Well did you ever have any transaction in Memphis where the goods were sold for immediate delivery; if so, to whom?

A. Yes, we have had transactions of that kind with all of our customers, at different times, particularly during the dull season. In cases where we have transactions for immediate shipment, I have verbally advised the Patterson Transfer Company that while
61 we had no contracts with certain customers here, I had quoted them prices, and they would furnish specifications to the Patterson Transfer Company and authorize them to deliver the goods.

Q. Now, to what customers do you refer?

A. I refer to Day & Bailey, Treadwell & Company; Fargason & Company; Mallory, Sons & Company; Early & Company; Monogue-Pidgeon Iron Company; Livermore Foundry & Machine Company; Thomas, Barnes & Miller; Orgill Bros., and possibly one or two others.

Q. Well, transactions of this nature, however, if I understand you correctly, are confined to the regular customers of the American Wire & Steel Company?

A. Yes sir.

Q. Any exceptions to that rule?

A. No sir.

Q. What proportion of the goods shipped by the American Steel & Wire Company to its order at Memphis, in care of the Patterson Transfer Company are sold to the customers doing business at Memphis; and what proportion is sold to customers living in the southwestern territory outside of Memphis?

A. About ten per cent. is sold to the Memphis jobbers, and about ninety per cent. to the trade outside of Memphis.

Q. Now, another question; you say about ten per cent. of all the goods shipped to Memphis are sold to Memphis jobbers; now, what proportion of this ten per cent. is sold under the contracts as you have de-cribed, and what proportion is sold for immediate delivery, in the absence of a contract?

A. Of course, now, this is a subject of a great deal of variation, but you refer to the past, because that is liable to change at any time?

Q. Yes.

A. I should say about three-fourths of the business in the past from Memphis jobbers has been sold under contracts, and about one-fourth for immediate shipment.

62 Q. But no part of the goods sold at Memphis or elsewhere have been sold by the Patterson Transfer Company?

A. No sir.

Q. State what is the nature of the Patterson Transfer Company's connection with these goods; that is, what do they do?

A. They receive and store the goods that we ship, and deliver

them on our orders already as authorized by the American Steel & Wire Company.

Cross-examined by Judge GREER, of counsel for the revenue agent:

Q. Mr. Taylor, I haven't fully understood one answer you have made on direct examination, in your clear statement of the dealings of your company, and I wish to ask you about that, which is concerning the receipt there in packages; you have stated that the American Steel & Wire Company ships to Memphis in packages its goods to be, placed in a warehouse here, the goods being shipped by the American Steel & Wire Company to its own order, care of the Patterson Transfer Company, and that these goods are sold in those same packages; now is it not a fact that the jobber who receives them sells them in the same packages to his customer?

A. Well, I could not say whether he does or not, because after he receives them from the Patterson Transfer Company they are his to dispose of as he sees fit.

Q. But to make plain what I know as a business man must be plainer to you, a keg of nails is a package, isn't it?

A. Yes sir.

Q. And a jobber who receives a keg of nails from you, selling to another merchant elsewhere, would not open and dish out a part of those nails, if he sold the whole keg, would he?

A. Not if he sold the whole keg; I don't suppose he would.

63 Q. The men who are your customers are wholesale merchants, who sell to other merchants, or to direct customers of theirs; such is the fact, isn't it?

A. Yes sir.

Q. You said something in your direct examination about the convenience of barge shipments; isn't it a fact, is it not, that the stage of water in the Ohio and the Mississippi rivers, over both of which rivers I understand your goods come, is such that you can, at all seasons of the year, ship goods to Memphis by brage?

A. No sir, we cannot.

Q. It is therefore, the object of your company to ship as large a quantity when the stage of the water permits it as can be sent by barge, because that is a cheaper freight transportation mode, isn't it?

A. If we can market them it is.

Q. In other words, the American Steel & Wire Company wants to get as much goods here as it can when the water stage is such that it can ship them, doesn't it?

A. Provided it can find a market for them.

Q. And it stores these goods here that are shipped to its order?

A. Awaiting specifications on contracts?

Q. Yes, and by specifications, sales of these goods?

A. No, the goods are already sold.

Q. Sometimes——

A. Under contracts, but not specified.

Q. Yes, sir, that is to say, you have solicited an order for goods generally?

A. We have sold them.

Q. And you have got an order for goods generally, at times?

A. Yes sir, but not specifications.

Q. This arrangement with the Patterson Transfer Company was not made by you in person?

A. No, sir.

64 Q. You know, however, of its existence for more than two years?

A. I know of it for two years; I know that it has been in existence during the past two years.

Re-direct-examination:

Q. If, I understand you, the goods before they arrive at the port of Memphis, are sold under these contracts for future delivery, but the parties to whom they are sold have not specified the goods embraced in the contract, which they want delivered?

A. Yes sir, that is it.

Q. That is the condition, is it?

A. Yes sir.

And further this deponent saith not.

Judge GREER: The signature of the witness to the deposition, because of the witness' intention to leave the city tonight, is waived.

EXHIBIT "A" TO WILLIAM TAYLOR'S DEPOSITION.

Office of American Steel & Wire Company.

Memorandum of Sale.

CHICAGO, ILL.

—— —— hereby purchases and agrees to receive from the American Steel and Wire Company, a corporation, and the said American Steel and Wire Company agrees to sell to —— ——

Quantity and description, Keg wire nails.

65 Specifications to be furnished in time for shipment of entire amount to be completed within sixty days from date of contract.

Shipments.—Wire nails —— $ — base

Price and terms, f. o. b. Pittsburgh, Pa. in carload lots, 2-½c. per 100 lbs. advance f. o. b. cars Cleveland, 5c. per 100 lbs. advance f. o. b. dock Cleveland, 10c. per 100 lbs. advance f. o. b. cars Joliet or De

Kalb, small lots for direct shipment from mills 5c. per 100 lbs. extra.

Above prices apply for direct shipments. All carload shipments for delivery at — per 100 lbs. over Pittsburg prices.

Terms sixty days net or 2% discount for cash if paid within ten days from date of invoice.

Remarks.—Seller guarantees above prices against their own decline on such part of this contract as may be shipped only during the period when such decline is effective.

Payment in U. S. gold coin or its equivalent in U. S. currency.

Each month's shipment to be treated as a separate and independent contract, but if the buyer fails to fulfill terms of payment under this or other contracts, seller may defer further shipments until payment is made, or may cancel this contract at his option.

The seller may decline to make deliveries on this contract, except for cash, whenever the seller for any reason shall have any doubt as to the buyer's responsibility, and so advise the buyer; whereupon the buyer shall have the privilege of satisfying the seller of his responsibility, and when the seller is so satisfied, then deliveries shall be made or renewed, as per above terms.

66 Strikes, differences with workman, accidents to machinery, or other contingencies beyond the control of the seller, to be sufficient excuse for any delay in shipment traceable to such cause.

Within a reasonable time after the removal of such contingency, seller is to complete deliveries as rapidly as possible.

The purchaser shall give the seller specifications of goods covering shipments, not less than ten days before time of shipment.

Accepted. Accepted.

STATE OF TENNESSEE, } ss:
County of Shelby, }

Personally appeared before me, Wm. H. Fitzhugh, a notary public, in and for said State and county, Wm. Taylor, who was by me sworn in said cause to speak the truth, the whole truth, and not-ing but the truth.

Witness my hand and seal notorial, at Memphis, this 11th day of August 1902.

WM. H. FITZHUGH,
Notary Public.

CYRUS GARNSEY, JR., the next witness introduced on behalf on the American Steel & Wire Company of New Jersey, on this, the 5th day of August, 1902, in the presence of the same counsel and at the same place, being first duly sworn, deposes as follows:

Direct-examination by Col. PATTERSON:

Q. Where do you reside, Mr. Garnsey?

67 A. In Memphis.

Q. How long have — resided here?

A. Some twelve years, but not continuously.

Q. In what business are you engaged?

A. General manager of the Patterson Transfer Company and the Galloway Coal Company.

Q. How long have you been so engaged?

A. About three years.

Q. In what business were you engaged prior to that time?

A. I was auditor of what is known as the Kansas City road.

Q. For what length of time?

A. Fourteen years.

Q. During those fourteen years, you resided how long in Memphis?

A. About nine years.

Q. Did your employment as auditor of the Kansas City road enable you to come to a knowledge of freights and the system of railroad transportation, as it exists in Memphis?

A. It did.

Q. In what business is the Patterson Transfer Company engaged?

A. In the transportation of passengers and freight.

Q. Is it a common carrier?

A. It is.

Q. State whether or not the Patterson Transfer Company has ever engaged in the business of buying and selling merchandise?

A. It has not.

Q. You have heard some of the witnesses testify in this case of an arrangement entered into between the Patterson Transfer Company and the American Steel & Wire Company, whereby the American Steel & Wire Company ships products of its manufactories deliverable to its own order at the port of Memphis, in care of the Patterson Transfer Company, and under which the Patterson Transfer Company receives these products, stores and assorts the

68 same, and distributes the same to the customers of the American Steel & Wire Company; now, please state whether or not you have a knowledge of, or were a party to this arrangement?

A. I was.

Q. State in your own way, now, and with particularity, the circumstances which led up to this arrangement entered into by the two companies?

A. When I associated myself with the Patterson Transfer Company I was impressed with the advantage of Memphis as a distrib-

uting point. I immediately saw that the gentlemen associated with me had seen these possibilities and cast about to enlarge our business on those lines. With the assistance of the freight bureau and an immense amount of labor, the advantages of Memphis, from its low rates—rail and water—were shown in comparison with the rates of other cities. The more that was gone into the more we were convinced of the possibilities of growth on that line. We then cast about for the producers of the goods that could be reached through this as a distributing point, and canvassed the field thoroughly. Incidentally this American steel & wire product came to our notice. The advantages of Memphis were shown. It was then ascertained that distribution was being made through Louisville, Greenville, New Orleans and was contemplated through Natchez.

Q. And Vicksburg?

A. Yes, Vicksburg too. We solicited the business for the Patterson Transfer Company, and through Memphis. It was then taken under consideration, and we were gratified by request for figures at which we would handle two thousand tons of their product at Memphis. Before we named the rate, we had to canvass very thoroughly as to where we would take care of and assort this product, which it was represented to us would come from their mills and be assembled en route to their destination. I quoted a rate per package and per hundred weight for unloading this barge, for transferring
69 it from the wharf to a storage place—which hadn't yet been arranged for—and a rate from such storage place to the dealers or to the railroads. Before we could arrange for a shed to put this first consignment of material in, it arrived here and we took it to our stable. An official of the American Steel & Wire Company came down here, saw it there, was taken to all the warehouses in the city, for then we had no idea whatever of storing material, we were simply after business as a carrier; we found no warehouse that had confidence enough in the future of the business to provide facilities enough for handling it, and the cotton sheds were shown this official of the wire company, and he expressed a belief that they could be satisfactorily utilized. We rented a shed, quoted him a rate per package for storage; the business has grown from its very inception; we are still handling, that is, assorting and storing the products in the cotton shed—in cotton sheds now—and the wire company have abandoned, because of the virtues they saw in Memphis, their warehouses at Louisiana, Greenville, Vicksburg and New Orleans, except for local business, and have abandoned the intention they had of having one at New Orleans.

Q. How many cotton sheds have been rented in order to carry on this business?

A. Three.

Q. Who rents them?

A. The Patterson Transfer Company.

Q. Has the American Steel & Wire Company anything to do with the rental of those sheds?

A. Nothing whatever.

Q. Now, Mr. Garnsey, you speak of the desirability of this business here; what has been its effect upon the jobbing trade of Memphis?

A. It has helped the jobbing trade of Memphis in every respect.

Q. Well, in what particulars?

A. Their source of supply is more readily available; it has advertised the jobbers of Memphis, and Memphis generally, to the country tributary to Memphis.

70 Q. What were the inducements which led the American Steel & Wire Company to enter into this arrang-ment?

A. Primarily availing themselves of the water transportation.

Q. State whether or not in locating the point of distribution here at Memphis it brought their products nearer to the consumer?

A. It did.

Q. State particularly just exactly all the Patterson Transfer Company has to do with the products of the American Steel & Wire Company, shipped to this point in care of your company?

A. We are advised by the Chicago office of the wire company of consignments to us by river, and by rail, and are furnished with bills of lading. Upon the arrival of these consignments the cars and barges are unloaded, the contents are recorded and transported to the cotton sheds where they are assorted into piles of various sizes, then as orders for shipment, received also from the Chicago office, reach us, these goods are delivered to Memphis dealers or to railroad depots, as the case may be. When deliveries to the railroads or Memphis dealers are made, the bills of lading of the railroad or the dray tickets signed by the Memphis dealers are forwarded to the Chicago office of the wire company: the records we keep are of the very simplest, and comprehend a record of the number of packages of each size received; also of those delivered and to whom delivered, and at the end of each month we furnish to the wire company at Chicago, a record showing the number of packages received during the month, the number of packages delivered during the month, and the number of packages on hand at the end of each month.

Q. In what form are the original packages made up?

A. The nails and staples are in kegs, barbed wire is in reels, and the plain wire is in coils or bundles.

Q. Tied with wire?

A. Yes, sir.

71 Q. State whether or not the goods are shipped from the manufactories in that form?

A. They are.

Q. In what form are they received here?

A. The same form as they are shipped in.

Q. In what form are they delivered to the customers of the American Steel & Wire Company?

A. The same form.

Q. State whether or not any package of these goods have ever been disturbed or broken by the Patterson Transfer Company?

A. None, except by accident or wreck.

Q. They are shipped from the manufactories, then received here in Memphis, and distributed in the same packages?

A. Yes sir.

Q. Are these packages all separate and distinct, one from the other?

A. Yes sir.

Q. And these goods are not put up, in boxes, are they?

A. No sir.

Q. They are put aboard of the cars or the barges each package to itself and unconnected with any other package?

A. Yes sir.

Q. Now, state Mr. Garnsey, what if anything the Patterson Transfer Company has to do with the sale of these goods?

A. Absolutely nothing.

Q. State what knowledge the Patterson Transfer Company has of the price at which these goods are sold?

A. None whatever.

Q. State whether, or not, you know anything of the method by which the American Steel & Wire Company sells these goods, of the general mode adopted by the company?

A. I do.

Q. Well, what is it?

72 A. The sale agent of the company, Mr. Taylor, soli-ts contracts from the jobbers here in Memphis, and in other territory under his jurisdiction, which contracts represent a given number of packages in a given length of time. These contracts are sent to the Chicago office, and as the jobbers desire the material under these contracts, they make requisition, or, as they call it, specify for it, and American Steel & Wire Company orders us to make deliveries as the outcome of that. That is the general plan—course of business.

Q. That is the usual course of business; are these goods sold by the sales agent before their arrival at Memphis or afterwards; what are your opportunities for knowing about these contracts?

A. Close personal contact for several years with the officials of the wire company.

Judge GREER: That is, they tell you what is their course of business?

A. Yes.

Q. State whether or not these contract- signed ever come under your observation?

A. I have seen them.

Q. Now I repeat the question what is their general course of business; are these goods shipped to Memphis and sold before their arrival here, or afterwards?

Judge GREER: This question is objected to on the ground that the witness has already stated he is not the agent of the American Steel & Wire Company, does not sell goods for them, lives in Mem-

phis and is not in the employ and connected with the defendant corporation, and cannot, except by hearsay, be familiar with the dealings of an association of which he is not a member nor an employé.

Q. Now, Mr. Garnsey, if you know the general course of business, answer the question?

A. For the greater part of the time that we have handled this
73 business, the orders to make deliveries have been received by us in advance of the goods, and the merchants or jobbers have been clamorous for the goods.

Q. Mr. Garnsey, what proportion of the goods shipped to Memphis are sold by the American Steel & Wire Company to jobbers at Memphis?

A. A small percentage.

Judge GREER: We object to this, unless the witness intends to produce, as we shall ask to be done, a record kept by him, by the Patterson Transfer Company, of all the goods received and sold.

Col. PATTERSON: In answer to this objection made by counsel for the revenue agent, counsel for the American Steel & Wire Company now states that there is no purpose on its part to with-hold any information from the revenue agent of the State, that can possibly bear upon this transaction, and he is invited to go to the office of the Patterson Transfer Company and examine for himself, any books kept by the Patterson Transfer Company, and to find out every fact connected with these transactions which he thinks is pertinent to this inquiry, and the only limitation that counsel for the American Steel & Wire Company places upon this invitation is that the revenue agent for the State is not expected to divulge or to make public information thus acquired, except in so far as he is advised it is pertinent to the matter under investigation.

Judge GREER: In response to this statement of counsel for the defendant, counsel for the revenue agent asks that Mr. Guarsey produce all the books of the Patterson Transfer Company, bring them to the office of the county court clerk where this investigation will be conducted or carried on.

Col. PATTERSON: In reply to this, counsel for the American Steel & Wire Company extend an invitation to the clerk of the county court to go to the office of the Patterson Transfer Company and make such investigation as he may deem proper, but counsel insists that whatever books are kept by the Patterson Transfer Company pertain to the business now going on, and to produce them and leave them with the clerk of the county court would result
74 in great inconvenience, if not loss, and for this reason alone counsel insist that the investigation shall be made with the view of giving the least inconvenience, and doing the least detriment possible to the Patterson Transfer Company.

Q. State what percentage, if you know?

A. I don't know.

Q. Well, about what percentage of the goods shipped to Memphi-

are sold to the Memphis jobbers and about what percentage go else where in the Southwest?

A. Something like ten or twelve per cent., to Memphis.

Q. Are any part of the goods shipped to Memphis manufactured in Tennessee?

A. No.

Q. And do you know where they are manufactured?

A. Pittsburg and Anderson, Indiana.

Q. Do you know whether any of them are manufactured at Joliet and Cleveland?

A. There may be some.

Q. Who is the sales agent and representative of the company in selling these goods in Tennessee?

A. William Taylor.

Q. Now, to whom does the Patterson Transfer Company deliver the goods, on what kind of a showing?

A. I don't believe I understand you.

Q. I mean, how do they deliver the goods on these specifications or orders?

A. On the orders of the American Steel & Wire Company.

Q. Suppose that any one desiring to buy these goods should go to the Patterson Transfer Company without an order from the American Steel & Wire Company, or its representative, do the Patterson Transfer Company sell the goods?

A. We sell no goods, and we would certainly not deliver a package, without we had instructions to do so from the American
75 Steel & Wire Company.

Q. They never have sold a package then?

A. The Patterson Tra-sfer Company never have sold a package; no sir.

Cross-examined by Judge GREER:

Q. Mr. Garnsey, where does the Patterson Transfer Company do business?

A. In the city of Memphis.

Q. And that business consists in hauling passengers to and from depots, and in hauling freight to and from the river to railroads and from railroads and freight depots; that is what you mean by calling it, the transfer company, a common carrier?

A. Yes, sir.

Q. It does not do business outside the city of Memphis?

A. No sir.

Q. You spoke of this contract that was entered into with this steel & wire company; was that a written contract; I mean by this contract, the contract between the Patterson Transfer Company and the Americal Steel & Wire Company?

A. It is not clear, Judge Greer, to me, whether it should be construed as a contract. I will tell you exactly what it was. They asked us for rates, as I stated, at which we would unload, transfer,

or haul to a place for assortment afterwards, what we would store it there month to month for, and what we would haul it then to the dealers or the railroads for, and we named them a rate per package on the kegs and per hundred weight on each reel of wire which is weighed by itself, and that represents all that we have. Now, this request for the quotation was in a letter and my quotation was in a short letter too.

Q. Will you produce your letter and the letter of the American Steel & Wire Company making the agreement that you now act under in receiving their goods?

76 Q. Will I produce them for examination?

Q. Yes.

A. I will.

It is agreed that copies of said letters will be made Exhibits A and B to this deposition.

Q. Now, Mr. Gar-sey, the goods that you afterwards received under this contract which you speak of as having been made by letter, were shipped here to the American Steel & Wire Company by the American Steel & Wire Company; they were their goods, therefore, and not yours, were they not?

A. Yes sir.

Q. As a rule they came here in barges?

A. Yes sir.

Q. What per cent. of the total amount of goods received by you for the American Steel & Wire Company came or comes in barges during the period of time that you have been handling their goods?

A. By far the greater per cent.

Q. As much as eighty per cent?

A. I should say so.

Q. Perhaps ninety per cent.?

A. Possibly but I should say between the two.

Q. Now, when those goods come, you have said the nails are in kegs, the wire is in reels and the staples are in kegs, and the other wire is on spools; they are all put together in one general mass in this barge, are they not; perhaps the nails go to themselves, the staples to themselves; the wire to itself; am I correct in that?

A. It is piled in tiers on the barges.

Q. There is no mark on any keg of nails, nor on any roll of wire indicating what that has already been sold to some particular person?

A. No, sir.

Q. In other words, you simply receive a barge load of nails or wire, which you haul to this storehouse that you now have, or storehouses?

77 A. Yes, sir.

Q. And at the same time you made this contract with the American Steel & Wire Company, and by you I mean the Patterson Transfer Company, you had no storehouse?

A. No, sir.

Q. The s-orehouse or houses which you have since rented, or warehouses, are rented for the purpose of depositing their goods in them; is this correct?

A. And the sorting of it, which is a very large portion of our duty in the matter.

Q. Consists in sorting them out; it is suggested that I ask you how the bills of lading come; does any bill of lading come for a barge in that way?

A. There is no bill of lading for a barge; there is a bill of lading for the rail stuff.

Q. How does that come; how is it made out?

A. It is consigned to the American Steel & Wire Company, in care of the Patterson Transfer Company, at Memphis.

Q. And so the barge comes directly to you in that way; that is, to the American Steel & Wire Company, care of the Patterson Transfer Company?

A. Yes sir.

Q. Now, I was interrupted in what was in my mind, for I want to understand this business myself thoroughly; you were notified in some way that there is a barge down yonder of the goods for the American Steel & Wire Company; please let me know how you know that, and by you I mean the Patterson Transfer Company all the time.

A. We are notified at the time of shipment, and keep ourselves posted through the wharf master, and by such means as we can, through people on the levee, of the arrival of these barges.

Q. You were notified by a letter from the American Steel & Wire Company saying that they shipped a barge, or two barges, or ten barges, whatever it is they have shipped?

78 A. Yes, sir.

Q. Then you have some one down there to let you know that the barge is landed?

A. Yes sir.

Q. And when it has landed you take your wagons and haul it up to these storehouses that you have for it?

A. Yes sir.

Q. And by sorting it out, I suppose that you mean you separate the nails from the staples and the barbed wire from the smooth wire?

A. The assortment, let me explain, for it explains an apparently inconsistency in a statement that I made a few moments ago, is that there are some twenty-six different sizes of nails that are used in this market, and there are very many different kinds of plain wire and there are many different kinds of barbed wire, two point, and four point and painted and galvanized and hog and cattle and so on. These all have to be assorted, and when I said our orders to deliver are in excess of the goods we have, it might to your minds be inconsistent that we had a good many packages just at that time; nevertheless, it all goes out in carloads and we may have eight pennies and no ten pennies; they are assembled from different manufacturing points.

Q. An assortment, now then, con-ists of dividing up these goods so that all of each kind will be to itself in a separate compartment?

A. Exactly.

Q. Now, the goods are in the storehouse and they have no mark to any particular person; when you assort and put them in there you don't mark them to any particular person?

A. No, sir.

Q. Now, being in there, an order is delivered to you for, we will say, a carload of ten penny nails; who brings that order to you so that you will take out that many nails?

A. The bulk of those orders come by mail from Chicago. Some of the orders are sent to us by Memphis dealers, or Memphis jobbers, I should say.

79 Q. The bulk of them come by mail from Chicago, which of course you mean to say, I presume, from the American Steel & Wire Company?

A. Exactly.

Q. And some are delivered to you directly by the Memphis jobbers?

A. Yes sir.

Q. Then you get out of the storehouse the goods called for in that order, haul them to the jobber or carry them to the depot for shipment, or to the boat for shipment, is your method, isn't it?

A. Then we get out—we haul them from the warehouse to the Memphis dealer or to the railroads of course.

Q. You, therefore, have constantly on hand of the goods of the American Steel & Wire Company, a quantity or quantities, have you not?

A. Yes sir.

Q. You could not tell, without reference to your books, what quantity you have had on hand for the last two and one-half years, could you?

A. No sir.

Q. Without desiring to bring the Patterson Transfer Company's business into this investigation any further than it is connected with the assessment of the American Steel & Wire Company, will you produce those books for examination, or for the examination of counsel in this matter?

A. I have referred to the books, or did just prior to my coming over here, and have in my hand an accurate statement of the number of packages on hand the first of each month from March 1st, 1901, to the first of last month, prior to which time the records will take some time to investigate, and they are smaller.

Q. This paper you have in your hand, that you were kind enough just then to produce, merely shows the number of packages and does not show the value of any of these packages?

A. It does not.

80 Col. PATTERSON: Do the books show the value?

A. Absolutely we have no record or knowledge of the value.

Q. This paper don't show of what those articles consist, don't your books show that they are nails or wire, or something?

A. The books do show, in all the detail, down to the very minutest the different kinds of wire and nails and staples.

Q. The object we have in view is entirely different from your object in keeping the books, I see; we wished to know the value of the thing you have on hand and you keep your book simply to show the quantity of thing you have on hand; is that correct?

A. It is. As a matter of fact, there is nobody connected with us that has any knowledge; I myself have absolutely no knowledge of the value of this stock, nor did I ever have.

Q. The memorandum which you have handed Mr. Garnsey, does not give us as full a statement as we wish, and as you are evidently willing for us to have, for it does not show of what these packages consist; I don't like to inconvenience you, but would be glad if you would make as a part of your deposition, only a written copy from the book—and then you need not produce the book—of how many packages you have had on hand each month, but what those packages consisted of; you could do that, I am sure.

A. I will do it, and mark it "Exhibit C" to my deposition.

Q. Mr. Garnsey, before we pass from this matter, do I understand that this memorandum which you have handed me which I read from, "On hand March 1st, 1891, 30,386;" means that on that particular day you had that many packages in the storehouse down there?

A. It does.

Q. I see in glancing at it, without looking through it, with any great care, that the amounts that you have on hand vary very considerably?

A. Yes sir.

81 Q. I see on July 1st, 1902, for instance, that you had on hand 127,564 packages; that represented the actual number on hand and the discrepancy is that great running through the year, is it, as to the amount you have on hand?

A. It is exactly as it is there.

Q. You speak of delivering these goods on orders; you told us how they came into the s-orehouse and how they got out of the storehouse, you have said it is by orders; those are written orders, of course?

A. Not all of them.

Q. How do you get verbal orders then?

A. We have had verbal orders from the officers of the steel and wire company.

Q. But you have written orders also?

A. Yes sir.

Q. When you receive those, you place them on file in your office, do you not?

A. The written orders, yes sir.

Q. I request you to produce those orders for examination and will as a further part of my question ask that you will file some speci-

men with this your deposition,—two or three, so as not to have any misunderstanding?

A. Yes sir, I will do so, with pleasure.

Q. Mr. Garnsey, is it not a fact that on one occasion some Memphis merchants have come to the Patterson Transfer Company and said they wanted goods immediately of the American Steel & Wire Company, and that within a day or two from their statement to the Patterson Transfer Company those goods would be delivered by you to them?

A. It is a fact.

Q. You, of course, got no money, for you have testified that you didn't sell it, but you must have got an order; whose order did you have in such instance?

A. We had the order of the American Steel & Wire Company.

82 Re-direct examination:

Q. Now, Mr. Garnsey, in case you get an application for goods for immediate delivery, what was the manner in which that business was transacted; just explain it in your answer to this question?

A. The specifications directed to the American Steel & Wire Company in duplicate were delivered to us at our office, and we made the delivery on those specifications. But never did we make a delivery without we had instructions from the American Steel & Wire Company so to do.

Q. Now, Mr. Garnsey, Judge Greer spoke about the consignment; how were the bills of lading made out, were they for goods on the barges or the barges themselves; in other words was the barge consigned to the American Steel & Wire Company, or the goods on the barge?

A. The goods on the barge, but we have no bills of lading for them.

Q. How did you know how many packages were on the barge?

A. The invoice transmitted to us by the American Steel & Wire Company give us that information.

Q. When would that be transmitted to you?

A. At the time the barge started from the original point.

Q. Now, if I understand you correctly, before the barge arrived at Memphis you would receive an invoice from the American Steel & Wire Company showing exactly the quantity of goods and the kind of goods loaded on that barge?

A. We would.

Q. And when the barge arrived here, with that invoice you would know exactly what the barge contained, and you would take the goods to the warehouse?

A. Yes sir.

And further deponent saith not.

83 Judge GREER: In view of the fact that the witness desires to leave the city tonight, and it being probable that he may not return before this matter is finally heard before the clerk, the signature of the witness to his deposition is waived.

STATE OF TENNESSEE, }
Shelby County. }

Personally appeared before me, Wm. H. Fitzhugh, a notary public, in and for said State and county, Cyrus Garnsey who was by me sworn in said cause to speak the truth, the whole truth and nothing but the truth.

Witness my hand and notorial seal, at Memphis, this 11th day of August, 1902.

WM. H. FITZHUGH,
Notary Public.

EXHIBIT "A" TO CYRUS GARNSEY'S DEPOSITION.

American Steel & Wire Company.

CHICAGO, *January 26th*, 1900.

Patterson Transfer Company, Memphis, Tenn.

GENTLEMEN: On what basis will you unload 2,000 tons of nails (in kegs) and wire (in spools) from barges at Memphis, store in your warehouse, and deliver to the various dealers and railroads in Memphis, on your orders? Please wire (collect) reply.

Yours truly,
(Signed) J. S. KEEFE,
General Traffic Manager.

84 EXHIBIT "B" TO CYRUS GARNSEY'S DEPOSITION.

MEMPHIS, TENN., *Jan'y 30th*, 1900.

American Steel & Wire Company, Mr. J. S. Keefe, general traffic manager, The Rookery, Chicago, Illinois.

DEAR SIR: We have your letter of the twen*y*t sixth instant and quote you for unloading two thousand tons of nails in kegs and wire in spools from barges at Memphis; storage in warehouse and delivery to various dealers and railroads in Memphis upon your order the following:—

For tr*n*asferring, — cents per cwt.
For unloading, — cents per keg or spool
If the wire is barbed — cents per spool additiona-
For storage, — cents per keg or spool per month.

Yours truly,
PATTERSON TRANSFER COMPANY.
(Signed) CYRUS GARNSEY, JR., *General Manager.*

(Here follow sheets 1, 2, and 3, pp. 85, 86, and 87.)

88 And on this, the 7th day of August, 1902, at the office of Gantt & Patterson, in like manner was taken the deposition of B. R. HENDERSON, on behalf of the American Steel & Wire Company, in the presence of Josiah Patterson and W. B. Henderson, of counsel for said company, and Jas. M. Greer, of counsel for the revenue agent.

The witness, being first duly sworn, deposed as follows:—

Direct examination by Col. PATTERSON:

Q. How long have you resided in Memphis?

A. Forty-nine years.

Q. In what business are you engaged?

A. I am engaged in the transfer business, and the coal business.

Q. What connection have you with the Patterson Transfer Company?

A. I am vice-president of the Patterson Transfer Company.

Q. What connection have you with the Galloway Coal Company?

A. I am vice-president of the Galloway Coal Company.

Q. State whether or not you give your personal attention to the business of the Patterson Transfer Company?

A. Almost entirely.

Q. Who was the predecessor of the Patterson Transfer Company?

A. P. M. Patterson & Company.

Q. Were you a member of that firm?

A. I was not; I was clerking for that firm, though.

Q. Well, how long has the Patterson Transfer Company and its predecessors, P. M. Patterson & Company and P. M. Patterson & Brother, been in business in Memphis?

A. Since 1852.

Q. In what business is the Patterson Transfer Company engaged; is it a common carrier?

89 A. It is a common carrier, and is engaged in the transportation business of passengers and freight to and from depots, and the river landings and business houses in the city of Memphis.

Q. You have been present when some of the witnesses have been examined in this case, have you not?

A. Yes sir.

Q. And you heard them testify in regard to an arrangement made between the Patterson Transfer Company and the American Steel & Wire Company in respect to the goods of the steel & wire company consigned to the port of Memphis; what do you know of your knowledge in respect to that arrangement?

A. Well, as vice-president of the company, I know what the arrangement was. I was not there when the arrangement was made between the general manager and the American Steel & Wire Company people, but I know what the arrangements were.

Q. Look at the letter here shown you, dated Chicago, January 26th, 1900 signed by J. S. Keefe, general traffic manager, addressed

to the Patterson Transfer Company, at Memphis, and a letter dated Memphis, January 30th, 1900, signed by the Patterson Transfer Company, Cyrus Garnsey, Jr., general manager, addressed to the American Steel & Wire Company, Mr. J. S. Keefe, general traffic manager, and state if the business relations between the American Steel & Wire Company and the Patterson Transfer Company were brought about by that correspondence, and if those letters are the basis of the business arrangement existing between the two companies?

A. Yes sir; this is the basis of the agreement existing between the two companies for the handling of the properties.

"CHICAGO, *January 26th*, 1900.

Patterson Transfer Company, Memphis, Tenn.

GENTLEMEN: On what basis will you unload 2,000 tons of nails (in kegs) and wire (in spools) from barges at Memphis, store in your warehouse, and deliver to the various dealers and railroads in Memphis, on our orders? Please wire (collect) reply.

90 Yours truly,

J. S. KEEFE,
General Traffic Manager."

The answer is:

"MEMPHIS, TENN., *Jan'y 30th*, 1900.

American Steel & Wire Company, Mr. J. S. Keefe, general traffic manager, The Rookery, Chicago, Illinois.

DEAR SIR: We have your letter of the twenty-sixth instant and quote you for unloading two thousand tons of nails in kegs and wire in spools from barges at Memphis; storeage in warehouse and delivery to various dealers and railroads in Memphis upon your order the following:

"For transferring, — cents per cwt.
"For loading, — cents per keg or spool.
"If the wire is barbed, — cents per spool additional.
"For storage, — cents per keg or spool per month.

Yours truly,
PATTERSON TRANSFER COMPANY,
(Signed) CYRUS GARNSEY, JR., *General Manager.*"

Q. State whether or not the original letter of the Patterson Transfer Company has the blanks in it as you have indicated?

A. No, sir.

Q. Why is the copy left with blanks?

A. Because the Patterson Transfer Company don't want to expose their private business.

Q. Did counsel representing the revenue agent——

A. It was agreed between counsel that it was not necessary for us to do it; they just wanted the contract without the compensation in it—the agreement, rather.

Q. State whether or not the subsequent shipments of goods by the American Steel & Wire Company were on the basis and in accordance with the agreement made by this correspondence?

A. They are handled on identically the same basis and in the same way.

91 Q. What character of goods are shipped to Memphis by the American Steel & Wire Company and distributed by the Patterson Transfer Company at this place?

A. Well, there are nails and staples in kegs of one hundred pounds, each, barbed wire on spools and smooth wire in bundles.

Q. Is the smooth wire tied?

A. Tied in separate bundles each; it is put up in that shape, in bundles of about one hundred pounds each.

Q. And tied by wire?

A. Tied by wire, each bundle.

Q. How are these goods shipped from the manufactories, in what kind of packages?

A. The nails and staples are shipped in kegs, one hundred pound kegs; the barbed wire on spools or reels, and the smooth wire in bundles.

Q. State whether or not these packages, or any of them are fastened together, or is each package separate and distinct to itself?

A. Each package is a separate and distinct package to itself, not connected with the other in any way.

Q. How are these goods usually shipped to Memphis?

A. They are usually shipped here by barges, sometimes, but rarely by steam boats and railroads.

Q. What proportion would you say was shipped by barges?

A. Well, by far the larger proportion, the greater proportion.

Q. How much by steamboat?

A. There have been very few instances, Colonel, of shipping by steam boat; only two or three that I remember.

Q. To whom do the barges belong on which these shipments are made, if you know?

A. Well, I only know like I know who the Lee Line boats belong to and any of those. Of course, I would say that the Lee line belonged to Lee Brothers. It belongs to a barge line, Colonel;

92 it is run by the coal people, the Monongahela coal people; that is my understanding they deliver the stuff here.

Q. Now, Mr. Henderson, when a barge lot of the goods of the American Steel & Wire Company are consigned to Memphis, to whom are they consigned?

A. They are consigned to the American Steel & Wire Company, care of the Patterson Transfer Company.

Q. What notice, if any, has the Patterson Transfer Company of the shipment?

A. Well, we get a statement from the Chicago office, stating that we shipped you today per barge, so and so; so many hundred packages of four pennies, so many six pennies, eights, tens, twelves, and so on through; so many reels of barbed wire, spools of barbed wire

giving the different kinds of them; so many of each separate kind, and so many bundles of smooth wire, giving each number of the bundles; for instance, there would be a thousand number tens and a thousand number twelves, and so on; they are numbered according to the size of the wire.

Q. Well, do you get this invoice before the goods arrive at Memphis?

A. Yes, sir, we get it before it gets here; we get it by mail.

Q. Well, on the arrival of the barge, what does the Patterson Transfer Company do?

A. They take this memorandum and go down there and check the packages due by the memorandum; that is, they receive them by the memorandum. They are delivered to us by the barge line, who have a representative there until the barge is cleaned out, unloaded, I mean, the cargo is discharged.

Q. Under what circumstances did the Patterson Transfer Company hire or rent a warehouse for the purpose of storing these goods; was any attempt made to get other parties to store the goods?

A. Yes, sir; I myself went to the various warehouses and tried to make arrangements, but failed to do so. The cotton ware-
93 houses men didn't see anything in it for them, and I failed to make any arrangements; any of us did.

Q. And then what did you do?

A. We rented a warehouse, it being absolutely necessary to have some place to assort them; it could not be done at the railroads nor on the levee.

Q. Suppose the goods are shipped by rail or by steamboats, then what notice do you get of their arrival?

A. We get notice always.

Q. In the same manner?

A. In the same manner. Now, we either get notice in the same manner, or probably a bill of lading; I am not positive; I think it is a memorandum notice, though, of the numbers in that cargo.

Q. Now, when the goods are transferred from the barge or railroad, or steamboat, as the case may be, to the warehouse, then what does the Patterson Transfer do with the goods?

A. They assort them.

Q. Well, how do they assort them?

A. Putting each separate number to itself.

Q. Well, how do you know the numbers?

A. The numbers are plainly on the kegs, and the reels are marked, and the smooth wire is tagged with numbers.

Q. Then the marks on the reels containing the barbed wire, and the tag on the bundle containing smooth wire, or the mark on the keg containing nails or staples, show just exactly the kind of wire or the kind of nails in the package?

A. Yes sir.

Q. And from those tags or lab*e*ls you assort the goods in the warehouse?

A. Yes sir.

Q. Well, what has the Patterson Transfer Company to do with the sale of these goods?

A. Nothing at all.

94 Q. State, Mr. Henderson, whether or not the Patterson Transfer Company has ever sold from the warehouse a single keg of nails, a single keg of staples, a single bunch of smooth wire, or a single bundle of barbed wire?

A. They have not.

Q. You said at the beginning of your deposition that you were connected with the Galloway Coal Company; in what way?

A. I am vice-president of the Galloway Coal Company.

Q. Is the Galloway Coal Company largely engaged in the mining of coal in north Alabama?

A. They are.

Q. Who makes purchases for that coal company in Memphis generally?

A. The individual?

Q. Yes.

A. I do, myself, make all of them except the dry goods.

Q. Mr. Henderson, isn't it frequently necessary for the Galloway Coal Company to purchase large quantities of nails or a considerable quantity?

A. Not large quantities, Colonel. They have three stores down there, and doing a country business, as well as trading with the people in the towns where we are, they buy a great many nails, not in large quantities,—ten, fifteen or twenty kegs is an order, for each one of the stores, and there is rarely a week that I don't get an order from one of the stores at the mines for nails.

Q. Well, state whether or not the Patterson Transfer Company, or anyone else, has ever sold out of the Patterson Transfer Company's warehouse, a single keg of nails or staples or bundle of wire, or reel of wire, to the Galloway Coal Company?

A. It never has, sir. I buy them all on Front street, wherever I am buying my groceries that day, at whatever store.

Q. State whether or not the American Steel & Wire Company has any representative or agent at Memphis who has charge of

95 the goods *of the goods* of the American Steel & Wire Company stored in the warehouse of the Patterson Transfer Company, who is authorized to make sales, I mean, any resident agent?

A. No, sir, they have no agent here.

Q. Where are the goods of the American Steel & Wire Company which are shipped to the port of Memphis, to the care of the Patterson Transfer Company and stored in the warehouse of the Patterson Transfer Company, manufactured?

A. Colonel, they are manufactured at various mills; I could not enumerate them; I don't know where they are located; there are several of them; I don't know how many.

Q. Are any of the mills situated in Tennessee?

A. None at all; all of them I know of are situated north of the

Ohio river. There are two or three points that I do know, but I don't know them all,—Pittsburg, Anderson, Indiana.

Q. When these goods are assorted in the warehouse of the Patterson Transfer Company, by whom are they delivered out of the warehouse and on whose orders?

A. They are delivered to the Patterson Transfer Company, on the orders of the American Steel & Wire Company.

Q. Are any of these goods stored in the warehouses of the Patterson Transfer Company sold to jobbers in Memphis?

A. Yes sir.

Q. Well, how are they sold, in the original packages in which they are shipped from the manufacrories, or otherwise?

A. They are sold in the same packages in which they are shipped and received by us; no change made in the package at all.

Q. Now, Mr. Henderson, will you please state fully and in detail just the manner in which the American Steel & Wire Company sell goods that are stored in the warehouses of the Patterson Transfer Company, how they are delivered, what contracts are made; what orders given, what receipts are taken, and all about it, in your own way?

96 A. The products of the American Steel & Wire Company are sold in this territory by their traveling men, agents, on contract; they will sell one jobber probably one to five thousand kegs of nails, so many tons of wire; that is on contract; and they have sixty days to specify in,—that is, to send in the numbers of the sizes of nails and wire they want; that contract is sent to Chicago, and as fast as they specify the orders are sent here to us and filled out of the stock here.

Q. Do you know when the contracts of sale are made, whether before or after the goods have arrived at Memphis?

Q. Yes.

Judge GREER: I object to that question, because the witness does not know that.

WITNESS: Well, I know they are sold before, as a rule; I could not say that every package is sold before they get here, but that is my understanding from the American Steel & Wire Company people. We understand exactly their mode of doing business.

Q. Well, what is the mode?

A. The mode is that these men go out and send the orders in and they manufacture at the different factories as rapidly as they can fill these orders. These orders are delayed in transit for weeks and weeks, because one factory, we will say, is way behind five or six weeks in their output; they can't put it out, and there are certain numbers of nails and wire that they are short in the ware-house on these different orders, and if they have got fifty or seventy-five carloads here, in every carload the nail we are short say is a ten penny nail; in every carload of three hundred that we ship there is some ten penny nails wanted in those cars. That very car that requires the ten penny nail to complete the order is kelayed here until they

are manufactured and got to this market, and then these orders are completed, and in that way holding the stock here very much
97 longer than it ought to be. I say that is one of the reasons why the stock accumulates in these warehouses.

Judge GREER: This question and answer is objected to, because the course of business in making sales by the American Steel & Wire Company is best known to the salesmen and agents of said company, who make such sales, and the purchasers and this is, therefore, secondary or hearsay evidence.

Q. These contracts, then that are made by the sales agents, never come to the possession of the Patterson Transfer Company, but are forwarded to the office at Chicago?

A. Yes, sir, that is the course.

Q. Well, how is the Patterson Transfer Company advised of these contracts?

A. They are advised by receiving the orders from the Chicago office on blank, just the specification as to what is to be shipped in each car load.

Q. Look at the paper here shown you and state what it is and mark it "Exhibit A" to your deposition?

A. This is an order from the office of the American Steel & Wire Company, in Chicago, to the Patterson Transfer Company, to deliver this party, May & Thomas Hardware Company, of Birmingham, this car load of nails, and I herewith file the same marked "Exhibit A" to my deposition.

Q. Now, is "Exhibit A" to your deposition a sample of the orders you get from the home office at Chicago for the delivery of these goods out of the warehouses of the Patterson Transfer Company?

A. Yes sir.

Q. Well, now, suppose a jobber here in Memphis desires to purchase from the American Steel & Wire Company goods, such as is stored in the warehouses of the Patterson Transfer Company, then if I understand you correctly the jobber makes a contract with the sales agent of the company, in which the price is fixed, the
98 quantity of goods is named, and then the purchaser has the option to specify the kind of goods any time within sixty days, and upon that specification the company orders the goods delivered?

A. Yes sir; he may specify at the time and buy right for immediate delivery; or he may buy for thirty days and specify, or sixty. In some instances, they do make a four months' contract.

Judge GREER: The same objection is made to this question and answer as the last objection.

Q. Now, Mr. Henderson, suppose that a jobber here in Memphis who was not a customer, or not known to the Patterson Transfer Company as a customer of the American Steel & Wire Company, should make out a specification of the kind of goods the jobber desired to buy from the American Steel & Wire Company, and pre-

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

sented the same to the Patterson Transfer Company without first communicating with the American Steel & Wire Company, what would the Patterson Transfer Company do?

A. Just decline to fill the order. We fill no orders without instructions from the American Steel & Wire Company.

Q. Well, state whether or not the Patterson Transfer Company is ever instructed by the American Steel & Wire Company to furnish a customer of the American Steel & Wire Company for immediate delivery on the specifications of such customer?

A. Yes, sir; they are.

Q. In other words, if the American Steel & Wire Company has a customer in Memphis, say John T. Fargason & Company, it would give the Patterson Transfer Company instructions to deliver to John T. Fargason & Company goods on the specifications of J. T. Fargason?

A. Yes, sir; they would instruct us to deliver to them when Fargason specified to us in duplicate; addressed to the American Steel & Wire Company, though, always.

Q. Now, when you deliver the goods on the specifications, what do you take from the jobber?

99 A. The local jobber?

Q. Yes.

A. We take a dray ticket and receipt for the number of packages that we deliver to them.

Q. What do you do with the dray ticket?

A. Send it to the American Steel & Wire Company's office at Chicago.

Q. Then who makes out the invoice?

A. They do at their office there. They charge the parties with the product and make the invoice out and send it to the customer here.

Q. What if any knowledge have you, or anyone else connected with the Patterson Transfer Company, of the price at which these goods are sold?

A. We have no knowledge of the price at all.

Q. If I understand you, here in Memphis when the American Steel & Wire Company has a customer, it will instruct the Patterson Transfer Company to deliver to that customer on specifications goods stored with the Patterson Transfer Company?

A. Yes sir.

Q. And when the specifications are made out, it is in the form of a duplicate letter, and the goods are delivered to the customer, his receipt taken, *and the goods are delivered to the customer, his receipt taken*, and the duplicate with the dray receipt, is sent to the Chicago office?

A. Yes sir, that is the way it is done.

Q. Now, where there is a customer outside of Memphis, say in Arkansas, Oklahoma, the Indian Territory, Mississippi, or Louisiana, or Alabama, and they have a contract with the American Steel & Wire Company for the purchase of its goods, when they make the

specifications of the goods they want delivered, to whom do they send it?

A. They send it to the Chicago office, to the American Steel & Wire Company.

Q. Then what is done at the Chicago office, if it is desired that you should deliver them?

100 A. Well, they send us these orders and deliver from the Chicago office.

Q. Such an order as Exhibit A?

A. Such an order as Exhibit A.

Q. And then you fill the order by transferring from the warehouses of the Patterson Transfer Company the goods named in the order to the railroad depot?

A. Railroad depot, and take a bill of lading for it there, and send it to the Chicago office.

Q. Now, Mr. Henderson, what proportion of the goods stored by the American Steel & Wire Company in the warehouses of the Patterson Transfer Company are sold to jobbers here in Memphis, and what proportion are sold to the customers of the American Steel & Wire Company outside of Memphis?

A. I could not tell you accurately what it was.

Q. Well, about what?

A. I think about ten per cent. in Memphis, and about ninety per cent. beyond.

Q. What has the American Steel & Wire Company to do with the renting the warehouses?

A. Nothing at all, sir.

Q. What has the Patterson Transfer Company to do with the collection of moneys due the American Steel & Wire Company?

A. Nothing in the world, nothing whatever to do with it.

Q. Then, if I understand you correctly, Mr. Henderson, the Patterson Transfer Company only receives the goods, transfers them from the barge or steamboat or railroad depot, as the case may be, to its warehouses, there assort- the goods, and then, upon the orders of the home office at Chicago, delivers the goods to the jobber here in Memphis who has purchased the same, or to the railroad company, in the event they are sold beyond Memphis?

A. That is all we have to do; all we do do.

101 Q. So you have nothing to do with the sale of the goods, with the price of the goods, or the collection of the money for which they are sold?

A. Nothing at all.

Cross-examined by Judge GREER:

Q. For what length of time does the contract existing between the Patterson Transfer Company and the American Steel & Wire Company exist?

A. As long as it is satisfactory to both sides. There is no contract in existence, except this filed in my deposition here.

Q. Then there is no fixed time for it — expire?

A. None at all. They can cancel it in twenty-four hours, or we could do the same.

Q. You speak of going to the barges and hauling the freight thereon consisting of nails and staples and wire, belonging to the American Steel & Wire Company to your warehouse; about how many barges do you unload for the American Steel & Wire Company each month of year?

A. Judge, I am not prepared to answer that question. I know that very recently we have unloaded five; but I would have to post myself before I could answer that; I could not approximate it.

Q. You could not give me from memory about the number?

A. I could not. Now, any other witness we have had on the stand could get nearer it than I.

Q. About what tonnage would each barge contain, Mr. Henderson; about how many tons of freight would you unload, is what I am driving at, here on one barge?

A. Well, some of the barges contain as many as nineteen thousand packages, weighing about one hundred pounds to each package.

102 Q. Mr. Henderson, I would like for you, if it does not put you to too much inconvenience, glance through the books, or get some one else, so as to be able to come over here and add to your answer about how many barges you unload in a year?

A. Judge, in Mr. Garnsey's deposition, he agrees to give you the entire number of packages that has been delivered here, and I think that would cover this matter.

Q. I don't think it would inconvenience you much——

A. Well, it is a great inconvenience to go back and find that, because there are records that it is not necessary for us to keep—and——

Q. Then you can not answer that question?

A. No, sir; I can not.

Q. You representing the Patterson Transfer Company, have three storehouses in which you deposit now the goods of the American Steel & Wire Company?

A. We had two up to the first of this month, two cotton sheds, and we rented a third one.

Q. You call them cotton sheds, but they had just been places where cotton had been heretofore stored, and where you store the goods?

A. That is what they were built for, Judge,—cotton sheds.

Q. What is the size of each one of those?

A. The last one, I think, had about forty thousand square feet in it; I am not positive now as to the exact size, and the other two have about twenty thousand each, I think, square feet.

Q. Do you know anything about the value of each of those packages of the goods of the American Steel & Wire Company, that you received?

A. I do not, sir.

Q. Those packages are all assorted, as I understand you, by the

Patterson Transfer Company after they reach the storehouse or cotton shed in which you place them?

103 A. Yes; I would like to say, Judge, also that it is necessary for us,—that is one of the particular reasons for a warehouse, just like a railroad having a depot, it is impracticable to assort them on the levee from the barges, and it is absolutely necessary for us to have a warehouse to assort them in; that is what we do there.

Q. And the assorting simply means you put the different nails of one size in a compartment and——

A. Those of one size together, yes sir.

Q. And those of a different kind or another size in another——

A. Another size in another, or a certain number in another, and wire of another number in another pile.

Q. And there is nothing about these packages when you receive them at the barges or depots, or when you are engaged in assorting them, to show that they have already been sold?

A. Nothing, Judge; there never is; even when we ship them out there is nothing to show that they belong to any particular party.

Q. You spoke of buying for the Galloway Coal Company nails?

A. Yes sir.

Q. You buy them in kegs, do you not?

A. Yes sir.

Q. Just the same sort of kegs, if you don't buy the same nail, that you haul from the barges to the storehouses?

A. Yes sir.

And further this deponent saith not.

R. B. HENDERSON.

Sworn to and subscribed before me, this 11th day of August, 1902.

WM. H. FITZHUGH,
Notary Public.

104 EXHIBIT "A" TO B. R. HENDERSON'S DEPOSITION.

Original.

American Steel & Wire Company.

Report No. —.

CHICAGO, 3/4/02. 190.

—— district —— works
Invoice to May & Thomas Hdwe. Co. Date shipped ——
Address Birmingham, Ala. District No. — Memphis $1022
Terms 60–2–10 Con. 1/15 Mill No. —
Ship to same
From —— Car No. — & initial ——
Via K. C. M. & B. Freight ——
F. O. B. Birmingham Customer's No. 3/1/02. #34 06
Salesman —— —— Invoice No. —
Ins. rate Ship as soon as possible.

Check.	Quantity.	Size.	Description.	Weight.	Price.	Am't.
	10 kegs	3	Com. nails			
	25 "	4	"			
	150 "	8	"			
	100 "	20	"			
	20 "	40	"			
	20 "	60	"			
	10 "	8	Casing			
	355 total		Galv. hog. Base			
	50 reels	4 pt.				

Deposition of Alfred D. Mason.

Filed November 26th, 1902.

In re THE AMERICAN STEEL & WIRE COMPANY OF NEW JERSEY,

Wherein the said company, on motion of C. D. M. Greer, revenue agent for west Tennessee, is cited to appear before Robert A. Speed, clerk of the county court of Shelby county, to show cause why the American Steel & Wire Company of New Jersey should not be assessed for and pay merchant's taxes to the State of Tennessee and Shelby county.

105 The deposition of Alfred D. Mason, taken by consent on behalf of the revenue agent in the above styled matter, at the office of Gantt & Patterson, this 7th day of August, 1902, in the presence of Josiah Patterson and W. B. Henderson, counsel for the American Steel & Wire Company of New Jersey, and Jas. M. Greer, of counsel for C. D. M. Greer, revenue agent for west Tennessee.

The witness testified as follows:

Direct-examination by Judge GREER:

Q. You are a member of the firm of Carrington Mason & Sons, insurance agents, doing business in the city of Memphis?

A. Yes.

Q. Did you as such agent, at any time, have an insurance policy placed with you, or your firm, by the American Steel & Wire Company on goods stored here in Memphis?

A. The insurance policies written by us on goods of the American Steel & Wire Company, stored in Memphis, were placed with us through H. H. Walker, western general agent of the Home Insurance Company, in New York, in Chicago, and did not come to us direct from the American Steel & Wire Company; it covered their property.

Q. Stored in Memphis?

A. On storage in Memphis.

Q. Where was that property stored?

A. It was stored in a warehouse on the southwest corner of Madison and Wellington streets, and some of it on Main street in what is known as cotton shed No. 1.

Q. What was the character of the goods insured?

A. Wait a minute; there was another warehouse at an earlier date. We insured some goods for them in the Patterson Transfer Company's warehouse just west of their stable on Jefferson street. It was either in the stable or warehouse adjoining, but I know we took the stable rates.

106 Q. What was the character of goods insured?

A. It was described as barbed wire, wire nails, smooth wire, and all of their manufactured products.

Q. What was the amount of the policy issued, or policies?

A. The policies varied in size from a thousand dollars to forty thousand dollars, and we insured at one time for them one hundred and ten thousand dollars, and at another time eighty thousand dollars.

Q. When was this insurance, what was the date of it?

A. From October, 1900, to May, 1901, between those dates, that is the best of my recollection.

Cross-examined by Col. PATTERSON:

Q. What was the largest amount of insurance you carried on the property of the American Steel & Wire Company at Memphis, at any other time?

A. One hundred and ten thousand dollars.

Q. What was the smallest amount?

A. The first policy written was thirty thousand dollars, and I should say it was the smallest amount that we had at any one time. It went from that to one hundred and ten thousand dollars.

Q. What had the Patterson Transfer Company to do with the insurance?

A. So far as we were concerned, nothing.

Q. What were the terms of these policies, how long did they run?

A. Most of them were written for one year. They were cancelled as the stock declined, and replaced as the stock increased; I suppose, according to the advices of the Patterson Transfer Company, I didn't know that.

And further deponent saith not.

The oath and signature are waived by the counsel for the American Steel & Wire Company of New Jersey.

107 *Deposition of C. D. M. Greer.*

Filed November 26th, 1902.

In the Matter of the Back Assessment of THE AMERICAN STEEL & WIRE COMPANY, before R. A. Speed, Clerk of the County Court of Shelby County, Tennessee.

STATE OF TENNESSEE, }
County of Shelby. }

Personally appeared before me, Wm. H. Fitzhugh, a notary public, C. D. M. Greer, State revenue agent, with whom I am personally acquainted, who made oath in due form of law taking the figures furnished him by the Patterson Transfer Company as to the monthly

balances on hand in the warehouses of the Patterson Transfer Company, in the city of Memphis, belonging to the American Steel & Wire Company, and arriving at the value of said packages by taking the highest number and the lowest number, adding them together, and dividing the sum by 2, as provided by law, he finds:

That the average number of packages from February 1900, when the American Steel & Wire Company commencing storing its goods in the warehouses of the Patterson Transfer Company, in the city of Memphis, to February, 1901, the average number of packages on hand in said warehouses belonging to said American Steel & Wire Company was 32,145. Basing the value of said packages at $2.25 per package, the average amount of stock for this period would be 72,326.

For the period from February 1st, 1901, to February 1st, 1902, he finds that the average number of packages was 73,710 valued at $2.25 per package, the average stock on hand would be $166,275.00.

For the period from February 1st, 1902, to August 1st, 1902, the average number of packages was 87,272, at the value of $2.25 per package the stock would be $196,362.00.

108 These, in his opinion, would be the assessments for the periods named.

From the proof in the case it appears that only about one-tenth (1–10) of the goods are sold in Memphis, the balance of nine-tenths (9–10) being sold outside of the State of Tennessee. Therefore the merchant's privilege tax should *on* be calculated on one-tenth of these amounts; the merchant's *ad valorem* tax upon the whole amount.

C. D. M. GREER,
Sta. Rev. Ag't.

Subscribed and sworn to before me, this the 12th day of August, 1902.

WM. H. FITZHUGH,
Notary Public.

Testimony of M. A. Stewart.

Filed August 12th, 1902.

Questioned first by Jas. M. Greer, att'y.

(Att'y GREER:) Mr. Stewart, you have been cited up here as a witness to be examined with regard to a certain course of business that you have had with the American Steel & Wire Company, in the city of Memphis, and with regard to any dealings you may have had with that corporation. This citation for you as a witness is the request of C. D. M. Greer, revenue agent, under the statutes of the State; he is claiming that the American Steel & Wire Company, are liable to a merchant's tax, for storing and selling goods in Memphis. I make this statement to you to be a caption to your deposi-

tion, and there is now present as counsel for the revenue agent, Jas. M. Greer, and as counsel for the American Steel & Wire Company, W. B. Henderson and Col. Josiah Patterson.

Q. Mr. Stewart, please state what is your business and where do you carry it on?

A. Hardware business; 234 Main St., Memphis, Tenn.

109 2. Have you ever purchased any goods from the American Steel & Wire Co.?

A. Yes sir.

3. About what quantity and in what time?

A. We have bought some nails from them.

4. A part of my question was—About what quantity have you bought from them and their value?

A. We have never bought very many nails from them. In fact, nails have been very high all the time. We have bought perhaps 3 or 4 car loads from them.

5. About what is the value of a car load of nails?

A. They vary according to the number of kegs and price, about $600, the kind we order. Fancy nails run into money very rapidly.

6. About what quantity and value of wire have you bought from them?

A. For years and years we have bought thousand of dollars' worth from them. I would like to look over the invoices *the* figure it all out.

7. How long have you been dealing with them?

A. We have been handling this wire fence:—we handled that fence when it was the Elmwood fence.

8. Have you got any wire from the American Steel & Wire Company through the house of the Patterson Transfer Company?

A. No, sir.

9. You would meet Mr. Taylor and give him an order for the nails. He would send the order to the factory and then afterwards the nails would be delivered by the Patterson Transfer Company?

A. That is practically right.

10. You have never bought any barbed wire or smooth wire from them at all.

A. No sir.

11. Then how long after Mr. Taylor would get an order from you as a general thing, would it be before you would get the nails that you had ordered?

110 A. My recollection is that it was from 5 to 10 days.

12. Was there any marks on the kegs of nails showing that they had been shipped to you?

A. No sir, I don't remember of seeing any marks. Possibly they might have been marked.

13. Your course of dealing was to place an order with Mr. Taylor, he representing the American Steel & Wire Company, and that order would be forwarded to Chicago, and not long afterwards the

Patterson Transfer Company would deliver to you the quantity you had ordered?

A. Yes sir.

14. Mr. Stewart, did you give an order one day and then two days thereafter or the next day, receive the nails from the Patterson Transfer Company?

A. No sir, I think it was five days, usually.

Cross-examination by Col. PATTERSON:

1. You really do not know of your own knowledge whether these nails were delivered from the warehouse or delivered from the cars?

A. No sir. I do not positively swear that; but I understood from Mr. Booth, he made a statement that he had sent a car load of nails from the warehouse.

2. You bought these nails from Mr. Taylor?

A. Yes sir.

3. You made a specification of the nails you wanted and they were sent to you, is that right?

A. Yes sir.

Testimony of R. P. Woodson.

Filed Aug. 11th, 1902.

Examined by JAMES M. GREER, counsel for plaintiff:

111 1. Mr. Woodoson, you are in business in the city of Memphis?

A. Yes, sir.

2. In what capacity?

A. Wholesale grocery business—I am manager of J. T. Fargason & Co.

3. As such a business man have — had any business dealings with the American Steel & Wire Company, of Chicago, Ill.?

A. Yes sir.

4. As a direct purchaser of goods of the American Steel & Wire Co. for your firm?

A. Yes sir.

5. What was the character of goods that was bought?

A. We bought nails—barb and smooth wire.

6. Can you state how long you have been dealing with them?

A. I don't know, sir; I have been buying for them for possibly ten years.

7. What has been the gross business between you, and what has been your method of purchasing goods, from the American Steel & Wire Company for the last two years?

A. We would make contracts for the delivery of goods, give orders and they fill them.

8. With whom?

A. The American Steel & Wire Company.

9. How do you do that. Do you pay down so much money?

A. No sir.

10. Do you remember the name of their agent?

A. Yes sir. Mr. Wm. Taylor.

11. After he has visited you and you have given him an order for goods, do you receive them direct from the factory?

A. Sometimes we do; and some time we receive them from the Patterson Transfer Company.

12. What is the general or usual course?

A. For the past two years we have received them usually from the Patterson Transfer Company.

112 13. Did you ever give orders one day and get the goods the next?

A. Yes sir, I have done so.

14. From whence did they come when you gave orders one day and received them the next?

A. I presume they were from the warehouse.

15. What were the value of your orders—what did they average a year?

A. Judge, I am not able to answer that question, without referring to our books.

16. Mr. Woodson, the general course of your business is, in dealing with the American Steel & Wire Company, that Mr. Taylor comes to your place of business and solicits an order from you or your house for nails and staples, and you make out a written order which is delivered to Mr. Taylor and by him forwarded to the company?

A. No, sir. I enter into a contract for delivery in a specified time, so many nails or kegs of nails, when we are needing goods. This order is mailed to the American Steel & Wire Company and they send us the order.

17. I hand you three orders; one of Jan'y 7, 1902; one of Jan'y 29, 1902 and one of March 19, 1902. Please examine these peapers and see if they are orders which you have given to the American Steel & Wire Company, for goods?

A. Yes, sir, they are.

Q. Now I notice that these contracts state (the one of March 29, 1902 I am looking at) "quantity and description"—2,000 kegs of nails 150 tons barb, plain wire and staples?

A. That means that we furnish specifications as we need the goods.

19. It says—"Specifications to be furnished in a given time for shipment of entire amount to be completed within 60 days from date of contract"?

A. That is right.

Q. You invariably had those goods shipped to you?

A. In some instances they were shipped to us, but in a majority of cases they have been shipped to the Patterson Transfer Company.

113 21. Was there any mark on the goods that you have received or any thing on any of the packages, indicating that they were your goods?

A. No sir.

22. I notice that there are two orders for Jan'y, one Jan'y 7, and the other Jan'y 22nd., and one for 3000 kegs wire nails and 50 tons barbed wire, plain wire and staples and the other is for 2000 kegs of wire nails and 150 tons barbed wire, plain wire and staples. Do they represent about the course of your dealings with them for one month?

A. No, sir. Certain seasons of the year our business would be heavier than others. For instance, we had more business in January and February *and* than we had in July and August.

23. I believe you state that sometimes you would wish goods—make out an order one day and get the goods the next?

A. Yes sir; it happened that way sometimes.

24. Now what sort of an order would you make out to get goods so prompt?

A. For instance, we wanted 300 kegs of nails, wire nails, I would write an order and give specifications of goods, calling for the different sizes, 4, 6, 8, 10, or 40 pennies as the case might be and as many reels of 4 point or 2 point galvanized barb wire and as many different sizes of smooth wire, mail it to the Patterson Transfer Co., or give it to a boy to deliver; (however it would be addressed to the American Steel & Wire Co.) and asking that it be delivered to us as soon as possible.

25. You would send an order somewhat like the one Col. Patterson handed you just now, down to the Patterson Transfer Co.?

A. Yes sir.

26. That would be addressed to the American Steel & Wire Company?

A. Yes sir.

27. You send these orders down to the Patterson Transfer
114 Co., and then you get the goods by Patterson's wagons hauling them and delivering them at your storehouse?

A. Yes sir.

28. You got these goods and wire in reels and staples in kegs and there was nothing on them to show any mark or tag or card, that these particular goods were put up for you direct from the factory?

A. No, sir.

29. Just as you received these goods and staples and nails in kegs and the wire in reels, you sold them to your customers, did you not?

A. Yes sir.

30. So you sold the same original packages that you got?

A. I did.

31. This is the course of dealings of all wholesale purchasers in this city, of this class of goods—is it not, Mr. Woodson?

A. I can only reply for myself, sir.

Cross-examination by Col. JOSIAH PATTERSON:

1. Mr. Woodson, let me see if I understand your testimony. My understanding of your testimony is about this. That Mr. Taylor is a travelling salesman or agent for the American Steel & Wire Co. in this territory and you are a customer of the American Steel & Wire Company, "your firm." Periodically Taylor calls on you to see what you want in the line of goods carried by his house, and you generally make what is known as a 60 day contract for the delivery of a quantity of the goods at a specified price. The contract is written out and signed by you as shown by the invoices here. And my understanding is that the goods named in the contract are to be delivered within 60 days, Taylor instructing his firm that J. T. Fargason & Co., have an option on a certain kind and quantity of goods that will have to be delivered, that is a certain kind of barb wire and nails &c. And then during the life of that contract according to necessities of your business, you make out an order or letter in duplicate
115 addressed to the American Steel & Wire Company specifying the kind of goods you want delivered to your order and the duplicate is sent over or mailed to the Patterson Transfer Co. and if these goods are stored in the warehouse of the Patterson Transfer Company, they are at once delivered to Fargason Co. and Fargason & Co., get a dray receipt of the goods so delivered, and then subsequently J. T. Fargason & Co. receives invoices from the American Steel & Wire Co. which corresponds with the letter or specifications and your contract is then credited with the amount of the invoice. Now, that is the course of business, is it not?

A. Yes, sir.

2. You were a customer, if I understand you, of the American Steel & Wire Co., before the Patterson Transfer Company had anything to do with it?

A. Yes, sir.

3. And the goods in that course were delivered by car or barge?

A. Yes sir.

4. And now they deliver by the Patterson Transfer Company?

A. Yes, sir.

5. Do you find this method of operation objectionable or a convenience to the general trade of Memphis?

A. A very great convenience.

6. Is it not a fact, Mr. Woodson, that when you *mkae* (make) these contracts that you often make them before the goods are brought to Memphis at all?

A. Yes, I do, at least Mr. Taylor, representing the American Steel & Wire Company says so.

7. Is it not a fact that it is frequently the case that when you make out a specification of goods wanted under your contract that you find that some of the goods are already here?

A. Yes; very frequently the case. I want to tell Judge Greer that we sometimes make out a specification one day and the goods are delivered the next day.

116 8. That means that the goods that you have ordered have arrived in Memphis before you make the specification?

A. Yes sir.

9. Is it not in the course of business, a fact, that these contracts are often made for the delivery of these goods before they are even in Memphis?

A. I don't know that I can answer that question; but I want to relate a conversation last summer. In talking the matter over with Mr. Taylor, he stated, "I make this contract with you but we are not ready to make shipment just at this time. We are over-sold and you will have to take your turn." I presume from this the goods were not in Memphis.

10. I want to know this. Is it not a fact that these goods are sold at what is known as Pittsburg prices and its cost of transportation which the customer loses, are paid at this point?

A. Yes, sir.

11. No matter where goods are sold they are sold at the Pittsburg prices?

A. That is right.

12. What does the Patterson Transfer Co. know of the prices you pay for these goods?

A. They do not know anything about it; they have been asked this by our house. On one occasion we had an inquiry from a party in *in* New Port, Ark. for the price of a certain mark of wire, and I called up the Patterson Transfer Company over the telephone, a young lady answering the telephone, and I asked if she knew or if anyone in the office knew what the price was of a certain specified number, and she said, "No, sir, I don't know and no one in this house know- anything about prices."

13. When these goods are delivered to you they become a part of the general stock in your store, do they not?

A. Yes, sir.

117 14. Of course, you pay a merchants' tax and you understand how that tax is arrived at, do you not?

A. Yes, sir.

15. In any event these goods that you receive from the American Steel & Wire Company become a part of your stock of goods on which you pay the taxes?

A. Yes, sir.

Re-direct examination by C. D. M. GREER, att'y:

1. Mr. Woodson, suppose that when Mr. Taylor comes here that you make a contract with him for a given number of kegs of nails, staples and tons of wire and when he comes back here again you need more than the contract calls for. How do you manage that?

A. I would take it up with the American Steel & Wire Company, at Louisville.

2. Then when would you get the goods you wanted?

A. We would get them as we need them.

3. Could you get them at once?
A. Sometimes we could, and sometimes we could not.
4. If they had them in stock here you would get them?
A. Yes, sir.
5. It frequently was the case that they had them in stock here?
A. Yes, sir.
6. Suppose Mr. Taylor is here today selling goods, and you make a contract as stated, and want to make specifications to-morrow or next day, could you get those goods at once?
A. No, sir—I say in some seasons we could, but not at this time.
7. Did you ever make a contract for goods and get the goods at once?
A. Yes, sir, it has been so, but it is more frequently the case that we do not.
118 8. The American Steel & Wire Company when you make your contract with them of course, do not know what goods you are going to specify?
A. No sir; they cannot tell exactly.

(C. D. M. GREER, att'y:) I have cited Mr. E. Gavin, of M. Gavin & C-. Joe and Fred Orgill of the firm of Orgill Bros. hardware men; W. B. and Lee Mallory of the wholesale grocery firm of W. B. Mallory & Sons Co.; Jno. Bailey of the wholesale grocery firm of Day & Bailey; A. D. Langstaff with R. G. Craig & Co.; and C. E. Mason.

It is agreed by counsel for the American Steel & Wire Co. that the testimony of the above named witnesses who have been regularly subpœn-ed in this cause, will testify, if introduced, to the same facts which were testified to by Mr. R. P. Woodson.

Judgement or Decree of R. A. Speed, County Clerk, Shelby County.

Filed August 15th, 1902.

Upon a motion, as the law requires, the American Steel & Wire Company was cited to, and did appear before me to show cause, *if any it had*, why it should not be assessed for taxes upon its merchant's capital, in the city of Memphis, county of Shelby and State of Tennessee, for the years 1900, 1901 and 1902.

Upon the oral and documentary evidence read before me at the hearing, and after argument of counsel on both sides, and consideration had, I find the following facts:

1. That the American Steel & Wire Company is a corporation by the laws of the State of New Jersey, and for the last two and a half years, it has, during the high stages of the Mississippi river and its tributaries, shipped from various points by barge, its products
119 in a manufactured state, to this city, where they have been stored as its property, in a warehouse or warehouses, procured for that purpose, and insured as its property, and where the shipments invariably reach their final destination until they are sold

and appropriated to contracts of sale to parties in Tennessee and the surrounding States.

2. That the products of the American Steel & Wire Company in Memphis, became commingled and intermingled with the general personal property of the State, and until distributed to fill contracts from the city of Memphis under the direction and orders of the agents of the company.

3. That the company pays no taxes whatever on the products shipped to Memphis, in any one of the States, and thus far has paid none to the State of Tennessee or the county of Shelby.

4. That the valuation of the said property, taking the lowest and highest value, from the first shipment to Memphis, about Feb'y 1st, 1900, to Feb'y 1st, 1901, for that year was $72,326.00 ascertained by the addition of the highest amount and the lowest amount, and dividing them. That the valuation of the property from the 1st of February to the 1st of February 1902, in like manner ascertained, was $166.275.00. That the mesne value of the property between the 1st day of Feb'y 1902 and the 1st day of August 1902, was $196.362.00. That not one dollar of said property was listed for taxation, and no report was made of the stock at any time, as being merchant's capital, by the said company.

Upon these facts, I find as conclusions of law, that the American Steel & Wire Company is subject to pay the tax as merchants upon its capital to the State, county of Shelby and city of Memphis, from the 1st day of Feb'y 1900 to the 1st day of Feb'y 1901, and a like tax from the 1st of Feb'y to the 1st of Feb'y 1902, and a like tax from the 1st of Feb'y 1902 for the year ending on the 1st day of Feb'y 1903, which is not yet due or ascertainable, and I
120 accordingly assess the American Steel & Wire Company for taxation of its merchant's capital, for the year ending the 1st of Feb'y 1901 at the valuation ascertained as above stated, of $72,326.00; for the year ending the 1st of Feb'y 1902, at the valuation of $166,275.00; and I determine that the mesne valuation of the products on storage in the city of Memphis, of the American Steel & Wire Company, between the 1st of Feb'y 1902 and the 1st of August 1902, is of the valuation of $196,362.00; and accordingly do I adjudge and determine that at the amounts stated, the said company be back assessed under the provisions of the acts of the General Assembly of the State of Tennessee, and as is provided therein, and shall at once pay to the clerk of the county, State and county taxes upon said amounts, together with revenue agent's commission of 15 per cent., upon said amounts, and all costs of this proceeding.

R. A. SPEED,
County Court Clerk.

Opinion and Decree of State Board of Equalizers. Filed Dec. 1, 1902.

R. A. SPEED, County Court Clerk,
vs.
AMERICAN STEEL & WIRE COMPANY.

"Opinion."

This is a case in which a non-resident corporation, carrying in a warehouse in the State of Tennessee certain of its goods, is sought to be assessed as a merchant on the goods in said warehouse. The said corporation was cited by the State revenue agent to appear
121 before the county court clerk of the county wherein the warehouse is located, for back assessment. The said corporation resisted assessment, denying liability on the following grounds:

1st. That it could not properly be assessed as a merchant:

2nd. That its goods in the warehouse were *in transitu* and that taxation on them would be an interference with interstate commerce; and

3rd. That the goods sought to be assessed would be exempt from taxation if produced and manufactured in Tennessee, and that therefore assessment on them would be discriminatory and in contravention of the Constitution of the United States.

The county court clerk after taking proof determined in favor of the revenue agent and decreed that the goods were properly assessable. An appeal was taken from the decision of the county court clerk to this board.

From the testimony filed in the case it appears that the said American Steel & Wire Company, a non-resident corporation, has an arrangement with the Patterson Transfer Company of Memphis, whereby the Patterson Transfer Company supplies the warehouse for the goods of the American Steel & Wire Company. Its goods consist of barbed wire and smooth wire on spools and nails in kegs. These goods are ordinarily shipped from the factories of the American Steel & Wire Company by barge, to Memphis, consigned to the American Steel & Wire Company. At Memphis they are deposited in the warehouse for the purpose of being assorted in conformity with orders from purchasers and re-shipped. There is no sales agent at the warehouse. The goods are only sold through the head office of the American Steel & Wire Company at Chicago. The usual method of sale is by traveling solicitor. This solicitor visits the merchants who may possibly become purchasers and solicits their patronage; the orders which he receives are sent to the head office at Chicago. The head office in
122 turn notifies the various factories or mills belonging to the company of the amount of each articles desired in the territory for which Memphis is the distributing point. In due

course the articles are sent to Memphis to be thence distributed. It appears that the purpose of having this warehouse in Memphis is to use Memphis as a distributing point for contiguous territory, it being conveniently adapted for this purpose. The object of each shipment of goods to the warehouse at Memphis is to meet the demands of customers of the American Steel & Wire Company in the above mentioned territory. It is contended that the general policy is only to ship goods to fill orders which have been sent in by the travelling solicitors, the goods being sent to the warehouse in Memphis and there assorted into orders and re-shipped to the customers. This appears to be the underlying policy pursued, but it appears from the evidence that goods in excess of orders are sent to the warehouse, presumably in anticipation of future orders from purchasers.

The American Steel & Wire Company claims that it is not a merchant and is therefore not liable to assessment for the merchant's ad valorem tax. The board is constrained to overrule this contention. While it is true that the goods in the warehouse are not sold in the *ma*nner customary with merchants, yet it appears that any merchant may become a purchaser by conforming to certain modes of procedure, to wit, giving his order to be transmitted to headquarters in Chicago, the headquarters in Chicago in turn give instructions to deliver through the warehouse.

The contention that is made by the corporation that the assessment of these goods is an interference with interstate commerce, and the further contention that the taxation of these goods would be discriminatory and in contravention of the Constitution of the United States are essentially judicial questions. The decision of this board sustaining the action of the county court clerk in no manner deprives the said corporation of any remedy it may seek to obtain from the courts.

There is no complaint as to the amount at which this assessment has been fixed.

REAU G. FOLK.

We concur in the above.

THEO. F. KING.

123 R. A. SPEED, County Court Clerk of Shelby County, *vs.* AMERICAN STEEL & WIRE COMPANY. } Before the State Board of Equalizers at Nashville, Tenn.

"*Decree.*"

This cause came on to be heard before the State board of equalizers sitting at Nashville, Tennessee, on this the 13th day of September, 1902.

Upon the pleadings and proof in this cause, and the argument and briefs filed, and the oral argument of counsel on both sides; upon consideration of all of which,—the State board of equalizers is

of the opinion that the findings of facts and the law, of R. A. Speed, county court clerk, are correct in all respects and the same is affirmed.

Following is the judgment of the court below.

"Upon a notice as the law requires, the American Steel & Wire Company was cited to and did appear before me to show cause, if it had any, why it should not be assessed for taxes upon its merchant's capital in the city of Memphis, for the years 1900, 1901, and 1902.

Upon the oral and documentary evidence read before me at the hearing, and after argument of counsel on both sides, and consideration had, I find the following facts:—

1. That the American Steel & Wire Company is a corporation by the laws of the State of New Jersey, and for the last two and a half years it has, during the high stages of the Mississippi river and its tributaries, shipped from various points, by barge, its products in a manufactured state, to this city, where they have been stored as its property, in a warehouse or warehouses procured for that purpose, and insured as its property, and where the shipments invariably reach their final destination until they are sold and appropriated to contracts of sale to parties in Tennessee and the surrounding States.

124 2nd. That the products of the American Steel & Wire Company in Memphis, become commingled and intermingled with the general personal property of the State, and until distributed to fill contracts from the city of Memphis under the directions and orders of the agents of the company.

3. That the company pays no tax whatever on the property shipped to Memphis, in any one of the States, and thus far has paid none to the State of Tennessee or the county of Shelby.

4. That the valuation of said property, taking the lowest and highest value, from the first shipement to Memphis, about Feb'y 1st, 1900 to Feb'y 1st, 1901, for that year was $72,326.00 ascertained by the addition of the highest amount and the lowest amount, and dividing them. That the valuation of the property from the 1st of Feb'y 1901 to the 1st of Feb'y 1902, in like manner ascertained, was $166.275.00. That the mean value of the property between the 1st day of Feb'y 1902 and the 1st day of August 1902 was $196.362.00. That not one dollar of said property was listed for taxation, and no report was made of the stock at any time, as being merchant's capital, by said company.

Upon these facts, I find as conclusions of law, that the American Steel & Wire Company is subject to pay the tax as merchants upon its capital, to the State, county of Shelby and city of Memphis from the 1st day of Feb'y 1900 to the 1st day of Feb'y 1902, and a like tax from 1st of Feb'y 1902 for the year ending on the 1st day of Feb'y 1903, which is not yet due or ascertainable, and I accordingly assess the American Steel & Wire Company for taxation on its merchant's capital, for the year ending the 1st of Feb'y 1901 at the valuation ascertained as above stated, of $72,326.00 for the year ending the 1st of Feb'y 1902 at the valuation of $166,275.00 and I

determine that the mean value of the products of storage in the city of Memphis of the American Steel & Wire Company between the 1st of Feb'y 1902 and the 1st of August 1902 is of the valua-
125 tion of $196,362.00, and accordingly do I adjudge and determine that at the amounts stated, the said company be back assessed under the provisions of the acts of the General Assembly of the State of Tennessee, and as provided therein, and shall at once pay to the clerk of the county court, State and county taxes upon said amounts together with revenue agent's commission of 15 % *per cent.* upon said amounts, and all costs of this proceeding.

(Signed) R. A. SPEED,
County Court Clerk.

County court clerk, R. A. Speed, will proceed to collect the taxes assessed by him in this cause, as provided by law.

The American Steel & Wire Company will pay the cost of this cause, which may be collected in the court below as provided by law.

THEO. F. KING, *Chairman,*
JNO. W. MORTON, *Sec'y,*
REAU G. FOLK,
State Board of Equalizers.

Deposition of J. W. Young.

Filed December 6th, 1902.

In the Chancery Court of Shelby County, Tennessee.

AMERICAN STEEL & WIRE COMPANY
vs.
R. A. SPEED, Clerk. } No. 12297, R. D.

126 The deposition of James W. Young, taken by consent at the office of Patterson, Neely & Henderson this 2nd day of December, 1902, on behalf of complainant, in the presence of Josiah Patterson, counsel for complainant, and James M. Greer, of counsel for defendant.

All formalities are waived, and all exceptions for irrelevancy and incompetency are reserved for the determination of the court at the hearing.

The witness being first duly sworn deposes as follows:

Direct-examination by Col. JOSIAH PATTERSON, counsel for complainant:

Q. Where do you reside, and in what business are you engaged?
A. Shelby county, in the suburbs of Memphis.

Q. Your business?
A. Tax assessor for Shelby county.
Q. How long have you been tax assessor of Shelby county?
A. Since January, 1893.
Q. How many bales of cotton are usually consigned to Memphis?
A. I suppose six hundred thousand bales.

Judge GREER: Objected to, because this is a matter of common knowledge, about which the witness must speak as any other citizen, and is not a matter of his own knowledge.

Q. How long have you lived in and about Memphis?
A. All my life, except about four or five years. When I was a child my father lived away from here.
Q. From what State does the cotton handled at Memphis principally come?
A. From Arkansas and Mississippi.
Q. During the time that you have been tax assessor of Shelby county, state what, if any, taxes have been paid on cotton shipped from other States to the market at Memphis, and sold here?
127 A. I want to qualify this statement by saying that I don't assess that part of the taxes at all. My understanding is, none at all. I don't assess any of the merchant's capital in any shape. My understanding is that there are no taxes at all.
Q. Well, has there ever been a tax during your incumbency in the office of assessor on cotton shipped to Memphis, within your knowledge?
A. No, sir.
Q. Mr. Young, are there not situated in Memphis a large number of manufactories of lumber—that is to say, mills which convert saw logs into lumber?
A. Yes, sir.
Q. State what, if any, taxes are paid on saw logs, or what, if any, taxes are paid by these manufactories on the products of the saw mills, in the way of lumber?

Judge GREER: Objected to as incompetent and irrelevant.

A. All the manufactories here claim exemption to the extent of their holdings consisting of the product of the soil of this State, whether it is lumber or any other product. For instance, the James & Graham Wagon Company have always been allowed exemption to the extent of their lumber and material on hand that was the product of the soil of this State.
Q. Well, these purchasers of lumber, as far as your knowledge extends, have paid no taxes on their products?
A. Not the products of the soil of Tennessee.
Q. Well, so far as your knowledge extends, have they paid any tax whatever on the products of their mill?
A. Yes, sir.
Q. In what way?
A. Suppose a concern has got twenty thousand dollars' worth of

lumber on hand. There is a difference between a dealer and a manufacturer. I just want to say this. If a man buys logs here and sells logs, he is a dealer, and comes under the head of a mer-
123 chant. On other hand, if he buys logs and manufactures—saws them up into logs, he is a manufacturer, and his business is reported to the assessor's office, and I make an assessment on it. The merchant's business doe-n't go through the assessor's office.

Q. On what do you assess?

A. On his raw material and his finished product both. But he claims and gets an exemption for that part of it that is a product of the soil of this State.

Q. Whenever the saw mill man produces lumber out of logs which are the produce of the soil of Tennessee, then he claims an exemption, and his lumber is not taxed, is that the way of it?

A. Yes, sir.

Q. But if he produces lumber out of logs which are the produce of the soil of other States, then he is liable for the tax?

A. Yes, sir.

Judge GREER: This question and answer is objected to on the ground that it calls for an expression of an opinion on a question of law, and as a matter of fact not involved in the suit now pending.

Cross-examination by Judge JAMES M. GREER, of counsel for defendant:

Q. Mr. Young, you have nothing to do with the assessment or collection of a tax on merchants or cotton commission dealers who buy and sell cotton in the city of Memphis?

A. None whatever.

Q. Your business is that of an assessor of property owned by citizens of Shelby county, or non-residents of Shelby county, where the property is situated in this county?

A. Yes, sir.

Q. You have nothing to do with assessing a lumber dealer, because this is a matter of privilege tax, which belongs to the county court clerk—am I correct?

129 A. Yes, sir.

Q. Hence, you have nothing to do with a merchant's tax, as to its assessment or collection?

A. None at all.

Re-direct examination by Col. JOSIAH PATTERSON, counsel for complainant.

Q. Who assess the property of the manufactories of this county?

A. I do.

Q. Why did you not assess the property of the American Steel & Wire Company?

A. Because if they have anything here except merchandise I don't

know it, I have nothing to do with any merchandise in any shape at all.

Q. Then, if they are liable for a tax at all, then it is as merchandise, and you do not assess merchants?

A. I do not.

And further this deponent saith not.

The signature of the witness to his deposition is, by consent of counsel, waived.

Agreement of Counsel.

Filed December 6th, 1902.

In the Chancery Court of Shelby County, Tennessee.

AMERICAN STEEL AND WIRE CO. *vs.* R. A. SPEED, Clerk. } No. 12297, R. D.

130 Counsel for complainant and defendant, subject to exceptions for irrelevancy and incompetency at the hearing, admit and agree that the following facts exist:

First. That there are extensive iron ore deposits situated in the State of Tennessee.

Second. That there are a number of furnaces in Tennessee engaged in producing of iron from the iron ore deposits in Tennessee.

This December 2nd, 1902.

PATTERSON, NEELY & HENDERSON,
Sols. for Complainant.
JAMES M. GREER, *Of Counsel for Defendants.*
WM. H. CARROLL, *Of Counsel for Defendants.*

Final Decree & Appeal.

Entered January 12th, 1903.

AMERICAN STEEL & WIRE COMPANY *vs.* R. A. SPEED, Clerk. } No. 12297, R. D.

This cause came on this day finally to be heard before the Honorable F. H. Heiskell, chancellor, presiding, on the bill and answer of defendant, and the proof and exhibits filed in the cause, and the cause having been fully argued by counsel, and considered by

131 the court, the court is of opinion that complainant is entitled to the relief as prayed for in its bill. It is therefore ordered, adjudged and decreed that complainant have and recover of the de-

fendant, Robert A. Speed, clerk of the county court of Shelby county, the sum of one thousand and thirty-one dollars and forty-four cents ($1,031.44), that being the amount of taxes, fees, commissions and costs paid by complainant to said Speed on the 18th day of October, 1902, together with interest thereon from said date.

And it further appearing that in the assessment and collection of said tax amounting to eight hundred and seventy — and ninety nine cents ($870.99), clerk's fees amounting to three dollars and fifty cents ($3.50) commissions amounting to one hundred and forty dollars and sixty-five cents ($140.65) and costs amounting to sixteen dollars and thirty cents ($16.30); aggregating said sum, one thousand and thirty one dollars and forty-four cents ($1,031.44), which sum was paid by complainant to said clerk under protest, as provided by law, and that this suit was brought within thirty (30) days after making said payment, for the recovery of the same:

It is now further ordered, adjudged and decreed that said sum was wrongfully collected by said defendant Robert A. Speed, as clerk of the county court of Shelby county, as not being due from complainant to the State of Tennessee, and further, that on the merits of the case presented in the bill and proof, the said Robert A. Speed was not authorized lawfully to collect the same:

Therefore it is further ordered, adjudged and decreed, and this court hereby certifies of record, that said sum was wrongfully paid, and ought to be refunded by the comptroller of the State in the manner prescribed by section 1062 of Shannon's Code of Tennessee.

The court further adjudges and certified of record that it appears from the evidence before the court that said Robert A. Speed, clerk of the county court of Shelby county, against whom
132 this suit was instituted, has acted in good faith, and has defended said suit with proper diligence and care, and therefore it is ordered that the costs of this cause be taxed, as provided by law in criminal cases, and be paid by the State, and certified to the comptroller as provided by law.

The said Robert A. Speed, clerk of the county court, of Shelby county, the defendant herein, prays an appeal from this decree to the next term of the supreme court of Tennessee, sitting at Jackson, Tennessee, and it is further ordered and decreed that said appeal be granted; but as said Speed is the representative of the State in this litigation, it is further ordered that no appeal bond be required by him; all of which is ordered, adjudged and decreed.

Agreement as to Transcript.

Filed Feb'y 19, 1903.

AMERICAN STEEL & WIRE COMPANY
vs.
ROBERT A. SPEED ET AL. } 12297, R. D.

It is agreed between counsel for complainant and defendants respectively, that the contracts made exhibits to the depositions of D. A. Merriman and Wm. Taylor already copied, are types of the contracts made by complainant with its customers, and that there are about one hundred other such contracts exhibited to the court, and that they be considered as a part of the record, but need not be copied in the transcript.

PATTERSON, NEELY & HENDERSON,
Sol's for Compl't.
GREER & GREER, *Sol's for Def'ts.*

133 *Certificate of Clerk.*

STATE OF TENNESSEE, }
Shelby County, } *ss:*

I, T. B. Caldwell, clerk & master of the chancery court of Shelby county, do hereby certify that the foregoing 135 pages contain a full, true and perfect transcript of all the proceedings had in a certain cause, lately pending herein, wherein American Steel & Wire Co. are complainants, and R. A. Speed county court clerk is defendant, as the same appears of record and on file in my office.

In witness whereof, I hereunto set my hand and affix the seal of said court, at office in Memphis, this 19th day of F'b'y. 1903.

[SEAL.]

T. B. CALDWELL,
Clerk & Master,
By W. M. COX, *D. C. & M.*

134 In the Supreme Court of Tennessee.

THE AMERICAN STEEL AND WIRE COMPANY
vs.
R. A. SPEED. } #31, Shelby Cha-cery Docket.

Statement of the Case.

James M. Greer, William H. Carroll, counsel for appellant.

Filed, April 11, 1903.
JOHN W. BUFORD, *Clerk,*
By W. L. UTLEY, *D. C.*
12—356

135 In the Supreme Court of Tennessee.

THE AMERICAN STEEL AND WIRE COMPANY
v.
R. A. SPEED.

Statement of the Case.

This is a suit in equity, to recover money paid to the county court clerk of Shelby county, Tennessee, under protest, on State taxes and upon a back assessment of the appellee upon its merchant's capital. The chancellor was of the opinion that the appellee was entitled to recover, and accordingly awarded the decree, from which this appeal is taken.

The theory of the decree is that the appellee is not liable to be taxed, and the defendant not authorized by law to collect the taxes paid; and the theory of the bill is that the back assessment is in contravention of the commerce clause of the Constitution of the United States, and the fourteenth amendment thereto.

The case shows that by proceedings, that were duly taken, the appellee was cited to appear before the defendant to show cause, if any it had, why it should not be back assessed upon its merchant's capital in the city of Memphis; that it did appear; that testimony was taken; that the cause proceeded to a hearing regularly before the defendant; that he adjudged that the appellee was liable to be back assessed upon its merchant's capital in this State, and accordingly assessed it. That judgment, the State board of equalizers, upon a hearing of the appellee's appeal, after due consideration, in all things confirmed. The opinion of the board is in the words and figures following:

136 R. A. SPEED, County Court Clerk,
v.
AMERICAN STEEL AND WIRE COMPANY.

Opinion.

This is a case in which a non-resident corporation, carrying in a warehouse in the State of Tennessee certain of its goods, is sought to be assessed as a merchant on the goods in said warehouse. The said corporation was cited by the State revenue agent to appear before the county court clerk of the county wherein the warehouse is located, for back assessment. The said corporation resisted assessment, denying liability on the following grounds:

1. That it could not be properly assessed as a merchant.
2. That its goods in the warehouse were *in transitu*, and that taxation on them would be an interference with interstate commerce, and
3. That the goods sought to be assessed would be exempt from

taxation if produced and manufactured in Tennessee, and that therefore, assessment on them would be discriminatory and in contravention of the Constitution of the United States.

The county court clerk after taking proof determined in favor of the revenue agent and decreed that the goods were properly assessable. An appeal was taken from the decision of the county court clerk to this board. From the testimony filed in the case it appears that the said American Steel & Wire Company, a non-resident corporation, has an arrangement with the Patterson Transfer Company, of Memphis, whereby the Patterson Transfer Company supplies the warehouse for the goods of the American Steel & Wire Company Its goods consist of barbed wire and smooth wire on spools, and nails in kegs. These goods were originally shipped from the factories of the American Steel & Wire Company by barge to
137 Memphis, consigned to the American Steel & Wire Company. At Memphis they are deposited in the warehouse for the purpose of being assorted in conformity with orders from purchasers and reshipped. There is no sales agent at the warehouse. The goods are only sold through the head office of the American Steel and Wire Company at Chicago. The usual method of sale is by traveling solicitor. This solicitor visits the merchants who may possibly become purchasers, and solicits their patronage; the orders which he receives are sent to the head office at Chicago. The head office in turn notifies the various factories or mills belonging to the company of the amount of each article desired in the territory for which Memphis is the distributing point. In due course the articles are sent to be thence distributed. It appears that the purpose of having this warehouse in Memphis is to use Memphis as a distributing point for contiguous territory; it being conveniently adapted for this purpose. The object of each shipment of goods to the warehouse at Memphis is to meet the demands of customers of the American Steel & Wire Company in the above mentioned territory.

It is contended that the general policy is only to ship goods to fill orders which have been sent in by the tra*le*ving solicitors, the goods being sent to the warehouse in Memphis and there assorted into the orders and reshipped to the customers. This appears to be the underlying policy pursued, but it appears from the evidence that goods in excess of orders are sent to the warehouse, presumably in anticipation of future orders from purchasers.

The American Steel and Wire Company claim that it is not a merchant, and is therefore not liable to assessment for the merchant's ad valorem tax. This board is constrained to overrule this contention. While it is true that the goods in the warehouse are not sold in the manner customary with merchants, yet it appears that any merchant may become a purchaser by conforming to certain modes of procedure, to-wit, giving his order to be transmitted to headquarters in Chicago, the headquarters in Chicago in turn to give instructions for delivery from the warehouse.
138 The contention that is made by the said corporation that the assessment of these goods is an interference with inter-

state commerce, and the further contention that the taxation of these goods would be discriminatory and in contravention of the Constitution of the United States are essentially judicial questions. The decision of this board sustaining the action of the county court clerk in no manner deprives the said corporation of any remedy it may seek to obtain from the courts.

There is no complaint as to the amount at which this assessment has been fixed.

REAU E. FOLK.

We concur in the above.
THOMAS F. KING.

And the decree of the State board of equalizers is as follows:

R. A. SPEED, County Court Clerk of Shelby County,
v.
AMERICAN STEEL AND WIRE COMPANY.

Before the State board of equalizers at Nashville, Tenn.

Decree.

This cause came to be heard before the State board of equalizers sitting at Nashville, Tenn., on this, the 13th day of September, 1902. Upon the pleadings and the proof in the cause, the argument and briefs filed, and the oral argument of counsel on both sides; upon consideration of all of which, the State board of equalizers is of the opinion that the findings of fact and the law, of R. A. Speed, county court clerk, are correct in all respects and the same is affirmed.

Following is the judgment of the court below:

139 Upon a notice, as the law requires, the American Steel & Wire Company was cited to and did appear before me to show cause, if any it had, why it should not be assessed for taxes upon its merchant's capital in the city of Memphis, county of Shelby, and State of Tennessee, for the years 1900, 1901, and 1902.

Upon the oral and documentary evidence read before me at the hearing, and after argument of counsel on both sides, and consideration had, I find the following fact-:

1. That the American Steel and Wire Company is a corporation by the laws of the State of New Jersey, and for the last two and a half years it has, during the high stages of the Mississippi river and its tributaries, shipped from various points, by barge, its products in a manufactured state, to this city, where they have been stored as its property, in a warehouse or warehouses procured for that purpose, and insured as its property, and where the shipments invariably reach their final destination until they are sold and appropriated to contracts of sale to parties in Tennessee and the surrounding States.

2. That the products of the American Steel and Wire Company in Memphis, become commingled and intermingled with the general personal property of the State, and until distributed to fill contracts

from the city of Memphis under the directions and orders of the agents of the company.

3. That the company pays no taxes whatever on the said products shipped to Memphis, in any one of the States, and thus far has paid none to the State of Tennessee or the county of Shelby.

4. That the valuation of said property, taking the highest and lowest value, from the first shipment to Memphis, about February 1, 1900, to February 1, 1901, for that year was $72,326, ascertained by the addition of the highest amount and the lowest amount, and dividing them. That the valuation of the property from the 1st of February, 1901, to the 1st of February, 1902, in like manner
140 ascertained, was $166.275. That the mean value of the property between the 1st day of February, 1902, and the 1st day of August, 1902, was $196,362. That not one dollar of said property was listed for taxation, and no report of the stock was made at any time as being merchant's capital, by the said company.

Upon these facts, I find as conclusions of law, that the American Steel and Wire Company is subject to pay the tax as merchants upon its capital, to the State, county of Shelby, and city of Memphis, from the 1st day of February, 1900, to the 1st day of February, 1901, and a like tax from the 1st day of February, 1902, for the year ending on the 1st day of February, 1903, which is not yet dur or ascertainable, and I accordingly assess the said American Steel and Wire Company for taxation on its merchant's capital, for the year ending the 1st day of February, 1901, at the valuation ascertained as above stated, of $72,326 for the year ending the 1st day — February, 1902, at the valuation of $166,275; and I determine that the mean valuation of the products on storage in the city of Memphis of the American Steel and Wire Company between the 1st of February, 1902, and the 1st of August, 1902, is of the valuation of $196,362, and accordingly do I adjudge and determine that at the amounts stated, the said company be back assessed under the provisions of the acts of the General Assembly of the State of Tennessee, and as provided therein, and shall at once pay to the clerk of the county court, State and county taxes upon said amounts, togehether with revenue agent's commission of 15 per cent. upon said amounts, and all costs of this proceeding.

(Signed)

R. A. SPEED,
County Court Clerk.

County Court Clerk R. A. Speed will proceed to collect the taxes assessed by him in this cause, as provided by law.

The American Steel and Wire Company will pay the costs of this cause, which may be collected in the court below as provided by law.

141

THOMAS F. KING, *Chairman,*
JOHN W. MORTON, *Secretary,*
REAU E. FOLK,
State Board of Equalizers.

After the affirmance of the judgment, the State taxes were paid under protest, and this suit was prosecuted for their recovery.

The judgments and proceedings before the State board of equalizers, set forth in the pleadings, are conclusive of every question involved in this suit, except the constitutionality of those provisions of the assessment laws which are averred to be obnoxious to the Constitution of the United States, and of that provision, being section 30 of article 11 of the constitution of Tennessee.

The court below was of a different opinion. The trial judge based his judgment on the single question that appellee was not a merchant, and affirmed the non-liability of the appellee to taxation upon that ground.

Assignment of Error and Brief.

The decree should have dismissed the bill of complaint, and the court was in error in not so decreeing, because:

1. This suit cannot be maintained, for it does not appear from any of the matters and things either stated in the bill of complaint or in the proofs that the State of Tennessee ought not to retain the taxes paid to the appellant.

Dillon on Municipal Corporation, section 751.
Lincoln *vs.* Worcester, 8 Cush., 55–58.

2. The judgment and decree entered by the State board of equalizers affirming the decree of the county court clerk, conclu-
142 sively determined all the matters and things in controversy between the appellant and the appellee, except the constitutionality of the provisions of the act under which the appellee was back assessed.

Sub-section 10, of section 39, of chapter 435 of the Session Acts of 1899.
Sub-sections 10 and 11, of section 38, of chapter 174 of Session Acts of 1901.
County Court *vs.* Marr, 8 Hump. 634.
Cooley on Taxation, 748–749.
Wellby on Assessments, section 158.

3. By the judgment and decree of the State board of equalizers the thing adjudged was that the appellee was liable upon merchant's capital to the State of Tennessee, and that judgment is conclusive of that question.

Oliver *vs.* Lynn, 130 Mass. 143.
Hicks *vs.* Westport, 130 Mass. 478.
Stanley *vs.* Supervisors of Albany, 121 U. S. 525–552.
Williams *vs.* Supervisors of Albany, 122 U. S. 163.
Palmer *vs.* McMahon, 133 U. S. 665.
Bank *vs.* Perea, 147 U. S. 9.
Grundy *vs.* Tenn. Coal Co., 94 Tenn. 305.
Ward *vs.* Alsup, 100 Tenn. 620, on page 750.
Westbend *vs.* Brown, 47 Iowa, 25.
Preston *vs.* Johnson, 104 Ill. 625.

4. The judgment of the State board of equalizers is by the express provisions of the law final and conclusive as to all matters passed upon by the board — necessarily concludes this court, as well as the Supreme Court of the United States, and the only inquiry open was whether the laws under which the appellee was back assessed are constitutional or not.

Clark *vs.* Titusville, 184 U. S. 129–133.
Stockhard *vs.* Morgan, 185 U. S. 27–30.
143 New York State *vs.* Roberts, 171 U. S. 658–661.
Caldwell *vs.* State of N. C. and S. C., 1903.

5. The appellee was properly back assessed upon its merchant's capital under section 28. It was engaged, and has been for some years, in trading in the city of Memphis, for it kept in warehouses its merchandise on hand for sale in that city.

Section 201, Acts 1899, chapter 435.
Subsection —, chapter 174, Acts 1901.
Kurth *vs.* The State, 2 Pickle, 134–137.
New York State *vs.* Roberts, *supra*, 661.

6. Section 30 of article 2 of the constitution of Tennessee is not obnoxious to the fourteenth amendment.

Kurth *vs.* State, 86 Tenn. 134–137.
New York State *vs.* Roberts, *supra*, 665, 666.
Bells Gap R. R. *vs.* Penn., 134 U. S., 232.
Judson on Taxation, sec. 149.

7. The law directing the back assessment of property being constitutional, the assessment law taxing merchants' capital does not violate the commerce clause of the Constitution of the United States.

Oliver-Finnie Grocer Company *vs.* Speed, 85 Fed. Rep. 408.
Price Co. *vs.* Atlanta, 105 Ga. 357, 358, 365.
Woodruff *vs.* Parham, 8 Wallace, 123–137.
Brown *vs.* Houston, 114 U. S. 622.
Coe *vs.* Farrell, 116 U. S. 516–528.
Interstate Commerce Commission *vs.* Detroit R'y Co. 167 U. S. 633–646.
People upon Relation of Pennsuvania R. R. *vs.* Knight, 171 N. Y. 354.
Express Co. *vs.* Ohio, 165 U. S. 794.
Pittsburg Coal Co. *vs.* Bates, 156 U. S. 584.
Kelley *vs.* Rhodes, 39 L. R. A. 600–602.
Smith *vs.* Jackson, 103 Tenn. 674.
May *vs.* New Orleans, 178 U. S. 509.
New York State *vs.* Roberts, *supra*.

JAMES M. GREER,
WILLIAM H. CARROLL,
Counsel for Appellant.

144 In the Supreme Court of Tennessee, April Term, 1903.

AMERICAN STEEL & WIRE COMPANY
vs.
R. A. SPEED, Clerk.

Brief in Behalf of Appellees.

Patterson, Neely & Henderson, solicitors for appellee.

Filed May 4, 1903.

JNO. W. BUFORD, *Clk.*

145 In the Supreme Court of Tennessee, April Term, 1903.

AMERICAN STEEL & WIRE COMPANY
vs.
R. A. SPEED, Clerk.
No. 12279, Shelby Chancery Docket.

Brief in Behalf of Appellees.

This suit was instituted in the chancery court of Shelby county, Tennessee, to recover $1,031.44, a merchant's tax assessed against appellee by R. A. Speed, clerk of the county court of said county, and which was paid by appellee, under protest, on the 18th of October, 1902. (Record, p. 16) The chancellor rendered a decree in favor of appellee, and the cause is now in this court on appeal.

Statement of Case.

Appellee is a corporation created under the laws of New Jersey. (Record, p. 28) Its situs is in the State of New Jersey, and its principal business office is situated at Chicago, Ill. It is engaged in the manufacture of nails, staples, barbed and smooth wire, at different points north of the Ohio river. None of its manufactories are situated in Tennessee, and all of its products consigned to Memphis are shipped from points beyond the limits of this State. (Record, p. 19)

Prior to the first of February, 1900, its manufactured products were sold and distributed throughout the Southwest, from Louisville, Ky.; Memphis, Tenn.; Greenville, Vicksburg and Natchez, Miss., and New Orleans, La. (Record, p. 75) About that time the

146 Patterson Transfer Company, a corporation created under the laws of Tennessee, having its situs at Memphis, and doing business at Memphis, represented to appellee that Memphis was the most available point in the Southwest at which to assemble and dis-

tribute its manufactured products to its customers in that section. (Record, p. 75.) At this time, and for many years prior thereto, the Patterson Transfer Company had been engaged in the business of transferring passengers and freights to and from the various railroad depots at Memphis, and from the landings on the Mississippi river. (Record, pp. 86, 87.) Appellee entered into an arrangement with the Patterson Transfer Company, whereby said company was to receive its manufactured products at Memphis, assort them so as to separate the different kinds of nails, staples and wire, and then to deliver them, either to the jobbers at Memphis, or to the jobbers beyond the limits of Tennessee, over the various lines of railroads and steamboats running into Memphis. (Record, p. 77.)

The goods of appellee are manufactured at different points, and it is necessary to assemble them at some place at which they can be assorted, and from which they can be distributed to the purchasers. (Record, p. 86) It is impracticable to assort the goods wither at the river landing or at the railroad depots when they reach Memphis, and, in order to facilitate the work, the Patterson Transfer Company has rented one or more cotton sheds, in which the goods are temporarily stored for the purpose of assortment and distribution. (Record, p. 98.) These warehouses are rented exclusively for this purpose, and the manufactured products of appellee, and no other goods, are stored therein, and they are not in any manner commingled with the mass of the property of Tennessee, or with any other goods.

The Patterson Transfer Company is a common carrier, and deals with appellee's products exclusively as a common carrier, and not one dollar's worth of its products are ever sold to the Patterson Transfer Company, or by it sold to others, and neither its officers or employees have any knowledge whatever of the price at which the goods are sold by the appellee. Under the arrangement, the business of the Patterson Transfer Company, in connection with appellee's products, is solely confined to their transfer to the warehouses, their assortment in the warehouses, and their distribution to the purchasers. (Record, pp. 98 and 99.)

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The evidence further shows that, prior to the time the goods are shipped to Memphis, sales agents of appellee canvass the southwestern country and sell the products of the company exclusively to jobbers, and in each instance where a sale is effected, the contract is embodied in writing, on a form prepared by appellee, in which the amount of goods purchased is specifically enumerated, and the time agreed upon within which they are to be delivered. (Record, pp. 61 and 62.) In fixing the price, the freight charges for delivery to the jobber are included. The goods so sold are described as so many kegs of nails, so many kegs of staples, so many reels of barbed wire, or so many coils of smooth wire, according to the terms of the purchase. (Record, p. 56.)

The evidence shows that there are many different kinds of nails, as well as different kinds of barbed and smooth wire, and it is expressly stipulated in the contract that the purchaser shall have the privilege of specifying, during the life of the contract, the kind of

wire, or kind of nails or staples he desires delivered to him under the contract. (Record, pp. 35 and 36.) These contracts also *psecify* from 60 to 90 days as the time within which the products are to be delivered, and at any time during the period prescribed in the contract, the purchaser may designate the kind of goods he desires delivered under it. These contracts are made, almost in every instance, before the goods arrive at Memphis—the point of destination, and generally the contracts are made in advance of the production of the goods at the manufactories. (Record pp. 32 and 33.) The sales agents of the company, not only in advance of the shipment
148 of the goods, but in advance of their production, canvass the southwes-*ren* country, visiting the various jobbers, ascertaining the amount of goods they will require within 60 or 90 days, and, this done, the contract is prepared, in which the company obligates itself to deliver, at the price named in the contract, the goods described therein, and the purchaser agrees to receive and pay for the same; but the purchaser reserves the right, in the face of the contract, to specify the exact grade or quality of goods he desires delivered under it, and he does this by writing out a specification showing exactly what he want-, and forwards the same to the office of appellee in Chicago, and then the goods, under an order from the Chicago office, are shipped and delivered to the purchaser—the office in Chicago sending the Patterson Transfer Company a copy of the specification, in order that the goods may be delivered in accordance therewith. (Record, pp. 58 and 62)

This method of transacting the business is modified in practice, insofar as the fulfillment of the contracts with the jobbers at Memphis is concerned. For the accommodation of the Memphis trade, appellee advises the Patterson Transfer Company of the names of its customers at Memphis, and they are instructed to deliver the goods embraced in the cantract with the Memphis jobbers, in the following manner, to wit: The memphis jobber makes out a specification in duplicate, and addresses a letter to appellee, as in any other case; but, instead of forwarding this letter and specification directly to appellee, he delivers the letter and specification to the Patterson Transfer Company, and the Patterson Transfer Company at once delivers the goods so specified, attaching the dray receipt to a copy of the specification, and forwards the specification, letter and dray receipt to the office of appellee in Chicago, and that office makes out an invoice and sends it directly to the jobber. (Record, pp. 34, 35 and 36.) However, where the jobber lives elsewhere than in Memphis, he sends the specifications originally, in the first
149 instance to the Chicago office, and a copy of the specification is sent by the Chicago office to the Patterson Transfer Company, which then delivers the goods on board cars or steamboats, as the case may be, consigned to the purchasers. (Record, p. 36.) This modification in favor of the Memphis jobber is solely for his convenience.

The evidence clearly shows that no one but a purchaser can make out a specification, or have goods delivered from the storehouses of

the Patterson Transfer Company; that no one can go to the warehouses and buy goods, and that no goods are ever delivered or distributed to anyone by the Patterson Transfer Company, except on the express directions of appellee. (Record, pp. 103 and 104.)

The evidence conclusively shows that only about 10 per cent. of all the goods distributed at Memphis by the Patterson Transfer Company are purchased by jobbers doing business in Memphis, and that the remaining 90 per cent. are delivered to jobbers beyond the limits of Tennessee. (Record, p. 68) The evidence further shows that 90 per cent. of all the goods coming to Memphis for reshipment and distribution are on their way to jobbers residing elsewhere than in this State. The method of doing business, as herein stated, was uniform, with one or two minor exceptions.

The evidence shows that Taylor, the sales agent, of appellee, at one time sold a carload of goods, under peculiar circumstances, to the Matt Stewart Hardware Company, as detailed by him in his testimony. Specifications were made out by Taylor, the sales agent, and the goods were delivered by the Patterson Transfer Company, the invoice being sent from the Chicago office in the usual way to such hardware company. (Record, p. 66.) Then, there were a few instances where the jobbers at Memphis had exhausted the goods under their sixty days contracts, and the Patterson Transfer Company were instructed, by appellee, to deliver the goods to these jobbers on their specifications. (Record, p. 67.) Taylor, the sales agent, testifies that these exceptional cases did not amount to exceed-
150 ing one-fourth of the goods sold to Memphis jobbers, or 2½ per cent. of all the goods consigned to Memphis. (Record, p. 68.)

The evidence further discloses that 90 per cent. of all the goods consigned to Memphis, are, before their arrival, sold to customers of appellee who reside beyond the limits of this State, and the goods so sold are assorted and reshipped at Memphis, while in the process of transmission from appellee's manufactories to the purchasers. (Record, p. 68) Seven and one half per cent. of all the goods received at Memphis are sold prior to their arrival in Memphis to Memphis jobbers and delivered to them on specifications as stated, and the remaining 2½ per cent. of all the goods sold to Memphis joobers were sold by the sales agent, but always to customers of appellee, and on instructions from appellee. (Record, p. 68) A form of the contract under which goods are sold is exhibited with the proof, and a very large number of contracts which were filed in evidence are not, by consent of counsel, copied in the record, it being understood that the one set out shows the character of all the others, and that the method of dealing is unvarying and uniform throughout the southwestern country. (Record, p. 56.)

The proof further shows that the great bulk of the manufactured products of appellee which comes to the hands of the Patterson Transfer Company is transported to Memphis in barges belonging to transportation companies, in which appellee has no interest, which are engaged in the carrying trade, and are common carriers,

while the remainder is forwarded to Memphis over the various lines of railroads running into that city. (Record, p. 96.)

The evidence shows that the Patterson Transfer Company is notified by the Chicago office that a certain quantity of appellee's products were shipped at a certain time on barges to the port of Memphis. These barges are met at the river landings by the Patterson Transfer Company, which receives the goods, transfers them to its warehouses, assorts them, and, from thence, distributes the
151 goods to the various customers of appellee on specifications made out, as above stated. (Record, pp. 97 and 98.)

The evidence further shows that all the goods forwarded to Memphis are products of the manufactories of appellee; that no part of them are ever purchased by appellee, that its sales agents are exclusively engaged in selling said products. (Record, p. 19.) The proof further shows that when its products reach Memphis, they are not, in any sense, held out to the general public for sale. (Record, pp. 99 and 100.) They are produced by appellee beyond the limits of this State, and are sold by its sales agents throughout the Southwest, who report all sales directly to the office at Chicago, whether made by jobbers at Memphis, or elsewhere beyond the limits of the State. (Record, p. 29.) All invoices for goods sold are made out at the office in Chicago, and forwarded directly to the customers of appellee. (Record, p. 34.)

The evidence further shows that the products of appellee are in the hands of common carriers from the time they leave their manufactories, until the moment they are delivered to the purchasers at their ultimate destination. That is to say, the products are either on the barges or railroads coming to Memphis, or, are being received, transferred and assorted by the Patterson Transfer Company at Memphis, or, are in the process of actual delivery by the Patterson Transfer Company to the jobbers at Memphis, or to the various lines of railroads and steamboats running out from Memphis, consigned to purchasers beyond the limits of the State. The evidence shows that the goods, from the time they leave the manufactories, up to the time they are ultimately delivered to the purchasers, are not held out for sale at any time or place whatsoever; but are actually, in point of fact, in process of transportation, and *in transitu*, up to the moment they are actually delivered to the customers who have purchased them. (Record, pp. 93–107.)

152 The proof shows that the goods are put up in the following or-ginal packages, viz: The nails and staples are in kegs, each keg weighing one hundred pounds; the smooth wire in coils tied by wire, and each coil weighing one hundred pounds, and the barbed wire on reels, the wire on each reel weighing on- hundred pounds. (Record, p. 96.) Each package weighs exactly the same, and each separately and distinctly made up at the manufactories for convenience of transportation, and, in this form, delivered to the common carriers. In this form they are delivered at the initial point of transportation. In this form they are transported in barges or by railroads to Memphis, and received by the Patterson Transfer

Company. (Record, p. 32.) In this form they are assorted at the warehouses of the Patterson Transfer Company, and distributed by it to the customers at Memphis, or to the various lines of steamboats and railroads running out of Memphis, consigned to purchasers beyond the limits of this State, and in which form they are actually delivered to the customers of the appellee. (Record. p. 101.). Each package is separate and distinct to itself, and while no particular package is consigned to any particular customer, each keg of nails and staples is marked so as to show exactly what the package contains, and each coil and reel of wire is marked with a tag showing exactly what the coil or reel contains, and no package is ever changed in any particular, from the time it leaves the manufactory until it is ultimately delivered to the customer. (Record pp. 98 & 99)

The proof further shows that the American Steel & Wire Company has no place in Tennessee where it transacts business. (Record, p. 39) No one residing in Tennessee is authorized to sell its goods, and no one in this State can go to the warehouses where its goods are stored for assortment and distribution, and bargain for any part of them. (Record, p. 33.). Its products are all sold before they get to Memphis, and most of them are sold before they are produced at the manufactories. (Record. 35.). They are only in Memphis temporarily, while *in transitu*, and exclusively for the purpose of assortment and distribution. (Record, pp. 78 to 82.).

153 Where the products of appellee are shipped to Memphis be rail, they are consigned to appellee, care of the Patterson Tr*n*asfer Company, and where they are shipped on barges, the Patterson Tr*n*asfer Company is advised when the barges will probably arrive at the port of Memphis, and are instructed by appellee to receive the same. (Record, pp. 97 and 98.)

The evidence further shows that some of the goods are produced at one manufactory and some at another, and consequently when a purchaser contracts for the delivery to him, within 60 or 90 days of a certain number of packages, it always turns out that some of the goods are consigned from one manufactory and some from another, and it is necessary, in order to fill contracts, for goods from the various manufactories to be assembled at some point where they can be assorted, reshipped and delivered to th customers of appellee, in accordance with the terms of their contracts and specifications. (Record, p. 86.)

The evidence shows that Memphis has, within recent years, become, by reason of its accessibility to railway and river transportation, a great distributing point, and it was selected as the distributing point for appellee's products, on account of its exceptional advantages. (Record, p. 59.)

The testimony of Mr. Young, the tax assessor, shows that none of the cotton shipped into Memphis from the surrounding States, pays any tax whatever, and that the manufacturers of lumber in

Memphis pay no tax on lumber made from logs which are produced from the soil of this State. (Record, p. 135.)

It is agreed by counsel that there are large iron deposits in Tennessee, and a number of furnaces in this State engaged in the manufacture of iron from the iron ore deposits in this State. (Record, p. 138.)

The bill alleges, and the answer admits, that appellee was assessed by appellant as a merchant, and required to pay the State a
154 merchant's tax for the years 1901 and 1902, amounting to $1,031.44. On appeal to the State board of equalizers, said assessment was affirmed, and, thereupon, within the time required by law, to-wit, on the 18th day of October, 1902, appellee paid said taxes, under protest. This suit was instituted by appellee, within the time prescribed by the statute, to recover the taxes so paid, on the ground that said assessment was illegal and void, for the following reasons:

1. Because appellee was never, at any time, a merchant, doing business at Memphis.

2. The assessment was in violation of article 1, section 8, subsection 3, of the Constitution of the United States, which empowers Congress "to regulate commerce with foreign nations, and among the several States, and among the Indian tribes."

First Assignment of Error.

The meaning of learned counsel for appellant is not made plain in this assignment. By reference to Dillon on Municipal Corporations, section 751, it will be seen that the doctrine there stated that "the legislature may, within constitutional limits, authorize a municipality to levy and collect retrospective taxes, and for this purpose to use the assessment rolls of a previous year." To this statement of the law, no exception can be taken; but its application to the present case is not apparent, as the right of the State to back assess property is not controverted.

Second, Third, and Fourth Assignments.

These assignments may be considered together. It is conceded that the board of equalizers have exclusive jurisdiction to revise and to equalize the assessments of property). The doctrine, as we understand it, was clearly stated by Justice Wilkes in the case of Grundy County *vs.* Tennessee Coal Company (94 Tenn. 305.). This
155 court there held that as to valuation, the assessment "becomes conclusive and final." But while the proceeding is conclusive, "so far as the value of the property is concerned, it is not conclusive as to the right of a county to assess and collect the tax, and every matter involved in that right may be inquired into in this court."

Again, in Shelby County *vs.* Railroad Company (16 Lea 412–413), this court, quoting from Judge Cooley, says:

"As a general rule, a tax cannot depend for its validity upon the ability to justify it to the satisfaction of a court or jury. Value is matter of opinion, and as the law has provided officers upon whom the duty is imposed to make it, it is the opinion of these officers to which the interests of these parties are referred. The court cannot sit in judgment on their errors, nor substitute their opinions for the conclusions the officers of the law have reached."

This doctrine is not controverted by appellee. It has never raised any question as to the amount of the taxes it was required to pay; but contests the right of the State to collect the taxes in question.

The case of the County Court *vs.* Marr (8 Humph., 634), referred to in the brief of counsel for appellant, is in accord with the opinions cited, and simply holds that the assessment of taxes by the county court, is not a judicial decision, or subject to review in the courts. The court holds that if the assessment is made by the county court without authority, it is a void act, and the col-ector will not be protected by it in levying the taxes, and would be liable for an action for so doing.

Subsections 7, 8, 9, 10 and 11 of section 38, of the assessment law of 1901, clearly defines the powers of the board of equalizers, and subsection 10 declares that the action of the board "shall be final and conclusive as to all matters passed upon by the board, and taxes shall be collected upon the values so fixed and found by said board."

156 This clearly had reference to valuation, and nothing else, because subsection 7 of the law says: "It shall be the duty of said board of equalizers at such biennial sessions to equalize, compute and fix the values of such properties as are within its jurisdiction by the standard of the actual cash value of the same, and for said purpose, said board shall have the power to reduce or increase the values of properties so as the values of all assessments equalized by said board shall conform to said standard of actual cash values."

In subsection 9, it is further enacted:

That "said board shall have jurisdiction of, and it shall be its duty to equalize at said biennial sessions, the assessments of all properties in this State, except such as are now required to be equalized by the governor, secretary of state and treasurer."

Subsection 11 provides:

That "said board of equalizers shall also hear appeals upon matters of back or reassessments, made by revenue agents or other officers of the State, from county trustees or county court clerks."

Now, it is very clear that the action of the State board of equalizers was only conclusive as to the question of value; but, as to the right to collect the tax, or any question arising before it, other than the question of value, its action is not final, and can be inquired into by the courts. It would be just as competent for the board of equalizers to determine the constitutional rights of the parties, as it

would be to determine that a manufacturer could be taxed as a merchant, or a merchant as a manufacturer. Its findings are only conclusive as to value.

When the assessment was made by the county court clerk, an appeal was taken to the board of equalizers within the time prescribed by subsection 11 of section 38 of the assessment law, and within the time prescribed by section 1059 of Shannon's Code, appellee paid the taxes to the county court clerk, under protest, and within thirty days thereafter, under section 1061, instituted this suit to recover the taxes so paid.

157 Section 1062 provides:

That "suit can be tried in any court having jurisdiction of the amount and parties, and if it be determined that the same was wrongfully collected, as not being due from the said party to the State, for any reason going to the merits of the same, the court trying the case may certify of record that the same was wrongfully paid, and ought to be refunded."

Again, section 1063 provides:

That "there shall be no other remedy in the case of the collection of revenue, or attempt to collect revenue illegally, etc."

There being no question of value raised in this case, but it being conceded that appellee, if liable at all, is liable for the amount of taxes assessed and paid by it to the county court clerk, it now remains for the court to determine whether the assessment was illegal or wrongful, and if illegal or wrongful, the remedy of appellee, under the statute is very plain.

Fifth Assignment.

This assignment raises the question as to wh-ther or not appellee was properly back assessed as a merchant doing business at Memphis.

Section 27 of the assessment law of 1901 provides:

"That merchants shall pay an ad valorem tax upon the capital invested in their business, equal to that levied on taxable property. This term 'merchants' as used in this act, includes all persons, copartnerships or corporations engaged in trading or dealing in any kind of goods, wares, merchandise, etc."

Subsection 1, of section 27, further provides:

"That under no circumstances, shall the amount to be assessed be less than the value average amount of stock on hand during the preceding year, to be ascertained, by adding together the value of the highest and lowest amount of stock on hand at any time during the year, and dividing the same by two, etc."

158 Section 30, of the act, provided:

"That the clerks of the county courts of the several counties of this State, shall collect all taxes on merchants, etc."

Subsection 6, of section 31, has refereence to the back or reassessment of property in certain cases, and provides that the back or re-

assessment shall be made by the county court clerk "in the case of merchant's taxes, and the county trustee in the case of other taxes covered by this act, etc."

Section 23, of the assessment law of 1901, provides:

"That all persons, copartners and joint stock companies engaged in the manufacture of any goods, wares, merchandise, or other articles of value, shall pay an ad valorem tax upon the actual cash value of the property, real, personal or mixed, which is used and held for the purpose of manufacture, preparing, completing, and finishing goods, wares and merchandise, and the articles in the manfacture of which the parties aforesaid shall be engaged."

Section 24 provides:

That "foreign corporations mentioned in sections 22 and 23, having plants, factories or businesses in this State, shall only be assessed on the actual cash value of the corporate property in this State."

Section 2553 of Shannon's Code provides, that a foreign corporation shall be liable for taxation in all respects, as a natural person.

Section 3 of the act provides that personal property shall be assessed annually.

Section 4 provides: That "it shall be assessed at its actual cash value," and section 5 provides that property shall be assessed "to the person or persons owning or claiming to own the same on the 10th day of January of the year for which the assessment was made, etc."

It thus appears that the county assessor has no jurisdiction to assess a merchant's tax, and this duty falls exclusively within the jurisdiction of the county court clerk; whereas the county
159 court clerk has no power to asssess personal property, and this duty falls exclusively within the jurisdiction of the county assessor.

It will be further observed that the amount of the assessment in the two cases is entirely different, and would necessarily bring about different results. Personal property is assessed as of the 10th day of January of each year, while the amount of the merchant's tax is determined by taking the highest amount of stock, and the lowest amount of stock during the year, and dividing the sum by two. Consequently it is very clear that if appellee was not a merchant doing business at Memphis, the whole proceeding before the county court clerk, by which it was assessed to pay a merchant's tax, was wrongful, illegal, and void, and, having paid the amount of the assessment, appellee is entitled to recover the same in this suit. The only pertinent inquiry, then is, whether the appellee ever has been, in any sense, a merchant. Who is a merchant?

This court, in the case of The State *vs.* Smith (5 Hump., 394), has definitely answered the question. In that case, the proprietor of a female school, which consisted of about 150 girl pupils, furni-hed all the teachers and students in his school with all the goods needed by them, such as books, clothing, shoes, stationery, etc. An attempt was

made to tax the proprietor as a merchant, and this court, in holding that he was not a merchant, said:

"The question whether the defendant is a merchant or not, must depend upon the techni-al significance of that term. For when a word used in a statute has a fixed technical meaning, the legislature must be understood as intending to employ it in that sense, unless there be something in the context which indicates an intention to use it in a different sense."

This rule is especially applicable to this case, because the law providing for the assessment of merchants and manufacturers is very distinct in its definitions, showing that the terms "merchant" and "manufacturer" are used in a technical sense, and there is nothing in the context of the act which indicates an intention to use
160 the terms in a different sense. In the case referred to, this court quotes from Tomlin's Law Dictionary, under the title of "Merchant," and defines the term to mean, "One who buys and trades in anything and, as merchandise includes all the goods and wares exposed to sale in fairs or markets, so the word merchant formerly extended to all sorts of trades, buyers and sellers; but every one who buys and sells is not, at this day, under the denomination of merchant. Only those who traffic in the way of commerce by importation or exportation, or carrying on business by way of emption, vendition, barter or exchange, and who make it their living to buy and sell by a continued assiduity, or frequent negotiation in the mystery of merchandising, are esteemed merchants."

This court then says: "From this definition it seems the business of buying and selling should be the pursuit and avocation of a party, by which he makes his living, in order that he shall be regarded as a merchant."

Lord Bramwell, delivering the opinion of the court in the case of Joselyn *vs.* Parsons (7 Exchequer, 127), held that a merchant is one who buys and sells, and that a manufacturer is not a merchant, because he only sells his products, and it would be as inappropriate to call him a merchant as it would be to say a farmer is a merchant, because he sells the produce of his farm.

The assessment law, section 27, provides that "the term 'merchant,' as used in this act, includes all persons, copartnerships or corporations engaged in trading or dealing in any kind of goods, wares, merchandise, etc." a definition that is in exact accord with the deliverances of this court, and the deliverances of Lord Bramwell, above referred to.

It, therefore, follows that appellee, in selling its manufactured products, must be regarded as a manufacturer, and not as a merchant. To be a merchant, it must buy and sell. Buying does not make a merchant, and neither does selling; but one must be
161 in some commercial pursuit and be engaged in buying and selling, before he can, in any proper sense, be called a merchant. To be a merchant, one must deal in goods and wares, and anyone desiring to purchase such goods and wares is entitled to buy the same at the market price. In this case, the goods were manu-

factured by appellee, without one dollar's worth of them ever having been purchased by it, and the appellee is only engaged in selling its manufactured products throughout the country, and generally before they are even produced. To say that it is a merchant dealing in goods, wares and merchandise, is simply a contradiction of terms, and an absurdity.

Sixth Assignment of Error.

As to this assignment, it is only necessary to say that appellee does not make the contention assumed. Appellee does not insist in its bill that section 30 of article 2 of the constitution of Tennessee is *bonoxious* the fourteenth amendment of the Constitution of the United States. On the contrary, it does insist, as will be hereafter shown, that the officers of Tennessee in assessing personal property cannot discriminate in favor of articles manufactured from the produce of the soil of Tennessee and articles manufactured from the produce of the soil of any other State, without violating the Constitution of the United States.

Seventh Assignment.

This assignment reaches the merits of the controversy. The contention of appellee is that the assessment made by the clerk of the county court is void, because it was made in violation of article 1, section 8, subsection 3, of the Constitution of the United States, which empowers Congress "to regulate commerce with foreign nations, and among the several States, and among the Indian tribes." Under this provision of the Federal Constitution, ab-
162 solute free trade is secured between the States of the Federal Union, and no State can in any way impair and interfere with free and untrammeled interstate commerce within the limits of the United States.

It is needless to say that the words "to regulate commerce among the several States," constitutes the bed rock on which rests the vast volume of interstate commerce, to which is attributable the marvelous growth and prosperity of the American people.

The Supreme Court of the United States, in the case of McCall *vs.* California (136 U. S., 108.) quotes, with approval, from Pomeroy's Work on Constitutional Law, as follows:

"Commerce includes the fact of intercourse and of traffic, and the subject matter of intercourse and traffic. The fact of intercourse and traffic again embraces all the means, instruments and places by and in which intercourse and traffic are carried on, and, further still, comprehends the act of carrying them on at these places, and by and with these means. The subject matter of intercourse or traffic can be either things, goods, chattels, merchandise or persons. All these may, therefore, be regulated."

In the same case the supreme court quotes, with approval, the language of Chief Justice Fuller in Lyng *vs.* The State of Michigan, (135 U. S., 166.):

We have repeatedly held that no State has a right to lay a tax on interstate commerce, in any form, either by way of duties laid on the transportation of the subjects of the commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it which belongs solely to Congress."

At one time it was a mooted question as to whether it was necessary for Congress, by appropriate legislation, to designate what was a regulation or interference with commerce, and what
163 was not; but, long since, the Supreme Court of the United States reached the conclusion that this provision of the Constitution required no act on the part of Congress in order to inforce it, and that in the absence of any legislation by Congress, absolute free trade necessarily existed, by virtue of the Constitution, between the several States. The court proceeds upon the idea that the Constitution itself gives Congress the exclusive power to regulate commerce, and this necessarily inhibits the States from doing so, and, therefore, the absence of any legislation by Congress means that it is the will of Congress that no interference shall take place.

At one time, in what was known as the license cases, it was held that in the exercise of the police power, a State might regulate the importation of vinous or spirituous liquors, but the Supreme Court, since then, in numerous cases, has decided that vinous and spirit--ous liquors are recognized as legitimate objects of commerce, and, therefore, that their importation in the State cannot be regulated or interfered with by State legislation, and, hence, it became necessary for Congress to pass what is known as the Wilson act, in order to enable the several States to enact such legislation. The doctrine here stated is expressly recognized in numerous cases.

See:

Leisy *vs.* Hardin, 135 U. S. 100.
Brown *vs.* Houston, 114 U. S. 622.
Pittsburg and Souther-Coal Company *vs.* Bates, 156 U. S. 577.

In view of the magnitude of the many questions involved in the proper construction and meaning of the commerce clause of the Constitution, and of the numerous cases which have gone up to the Supreme Court of the United States involving its meaning and application, it is not singular that, in commenting on the numerous phases of the question, there is sometime, at least, apparent conflict in the opinions of the court. The court recognizes this to be true, and in the case of Asher *vs.* Texas (128 U. S., 129), declared
164 that, where one of its decisions was not in harmony with some of its previous decisions, the latter decision had the effect to overrule the previous decisions with which it was in conflict, whether such previous decisions were, or not, mentioned and commented on.

The case of Brown *vs.* Maryland (12 Wheaton, 436), is, and will always remain, the leading case on this important subject. In that case Chief Justice Marshall decided that an importer from a foreign country, or from a sister State, had the constitutional right to bring his goods into the State, and there sell them in the original package, and that the State could not regulate such commerce by taxing it, or otherwise interfering with it. The cardinal idea in the case is that no State can prohibit importations from foreign countries or other States, and in order to prevent such interference, it was absolutely essential, not only to protect the importer in his right to bring the goods into the State, but to protect the goods themselves from taxation as long as they remained in the original packages, and also in the right to sell the goods in the original packages to the citizens of the State into which they were imported. The exhaustive and voluminous opinion of this great judge, while it has from time to time been more or less criticised, even by some of his successors on the bench, has stood the test of time and reason, and the conclusion he then reached is the recognized law of the land.

This court has frequently passed, either in terms, or substantially, on this question.

In the case of Milan Milling Co. *vs.* Corten (9 Pickle, 590), it held that a foreign corporation, selling milling machinery to parties in Tennessee, and sending an agent to Tennessee to erect the mill, was under the protection of the commerce clause of the Constitution of the United States, and could not be taxed as doing business in Tennessee.

165 The general rule is that where goods are shipped from one State into another, they are exempt from taxation, under the commerce clause of the Constitution of the United States, as long as they remain in the original packages, and until they become commingled with the goods of the State into which they are imported. It therefore, becomes important to inquire, what is the meaning of the term "original package"?

In the case of Austin *vs.* The State (17 Pickle, 575), this court defines an original package, within the meaning of the law of interstate comerce, to be "a package, bundle, or aggregation of goods put up in whatever form, covering or receptacle, for transportation, and, as a unit, transported from one State or nation to *na*other."

In the case of Guckenheimer *vs.* Sellers (81 Fed. Rep. 997), Judge Simonton, delivering the opinion of the court, defined an "original package," within the meaning of the law of interstate commerce, to be a package delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped. In the case of liquor in bottles, if the bottles are shipped singly, each is an original package: but if a number are fastened together and marked, or in a package, box, barrel, crate or other receptacle, such bundle, box, barrel, crate or receptacle constitutes an original package.

In the case of McGregor *vs.* Cohen (39 L. R. A. 484.), the supreme court of Iowa holds that the Federal Constitution has reference to

and protects that which is the subject of commerce, and only so long as it preserves the form and remains the exact subject of importation. It is the original package which is protected.

The supreme court of Alabama, in the case of Keith *vs.* The State (10 L. R. A. 430), held that where intoxicating liquors were imported in small bottles, each bottle being wrapped in a separate paper, in which condition they were delivered to the carrier, who,
166 for the purposes of facil-tating transportation, placed the bottles in boxes furnished by himself, each bottle would constitute an "original package."

In the case of Scollenberger *vs* Pennsylvania (171 U. S., 1), the court held that a ten-pound package of oleomargarine ma-nufactured, packed and marked, imported and sold, was an original package, and protected by the commerce clause of the Federal Constitution. See, also, Sauree *vs.* The State, 82 Fed. Rep., 615.

But the case of May *vs.* New Orleans (178 U. S. 406), cited by counsel for appellant, is the latest deliverance of the Supreme Court of the United States on this important subject. In that case it seems that Mays & Co., merchants, at New Orleans, were engaged in the business of importing goods from abroad and selling them. In each box or case in which they were brought into this country there would be many packages, each of which was separately marked and wrapped. The importer sold eac*k* package separately, and not the box containing all the packages. The court held that the box, case, or bale in which the separate parcels were placed, was the original package of commerce, and when it reached its destination, and was opened for the purpose of exposing to sale the separate parcels or bundles, the goods lost their distinctive character as imports, and each parcel or bundle became a part of the general mass of property in the State, and was subject to local taxation. However, as long as the original packages remained in the box, case or bale in which they were imported, they were in the original package, and protected by the commerce clause of *of* the Constitution of the United States. The court further held that while the goods imported retained their character as imports, and remained the property of the importer, in the original form or package in which the goods were imported, they were not the subject of taxation. Justice Harlan, who delivered the opinion of the court in this case, it may be remarked, dissented in the case of Leisy *vs.* Hardin, whereas
167 Fuller C. J., and Justices Brewer, Shiras and Peckham, dissented in this case, showing that the opinion of Justice Harlan goes to the extreme limit, when an adverse view is taken of the case under discussion, and yet it is clearly within the decision of May *vs.* New Orleans.

The cases cited clearly define the meaning of the term "original package." It makes no difference whether it is one or ten thousand packages, if they are all distinct, and are imported and sold as they were originally made up at the initial point of shipment. Under these authorities, it is very clear that the products of appellee are

protected from taxation by article 1, section 8, of the Federal Constitution. At the initial point of shipment, the *ap*ckages consisted of kegs of nails and staples, coils of smooth wire, and reels of barbed wire, each package being separate and distinct from every other package, and each weighing one hundred pounds, and each being distinctly marked, showing exactly what it was. These packages were never changed in any way, or in any particular, until they were ultimately delivered to the customers of appellee. They were the packages in which the goods could be most conveniently handled and transported, and were unquestionably the "original packages" of commerce. These packages were received by the Patterson Tr*nas*fer Company, stored, assorted and distributed, without any change in their form, and delivered, without any change whatever, to the customers of appellee. They were not commingled or a-sorbed in any way with the mass of property in Tennessee. They were kept until actually delivered to the customers, distinc-ly apart from all other *rp*operty, and were stored in the warehouses simply for the purposes of assortment, distribution and delivery for reshipment, and the warehouses were rented for the exclusive purpose of this service.

This brings us to the case of Leisy *vs.* Hardin (135 U. S., 100), which, like the case of Brown *vs.* Maryland, is a land mark in the law on this subject. In that case it appears that a firm of
168 brewers in the State of Illinois, doing business under the firm name of Gus Leisy & Co., transported and stored in a warehouse at Keokuk, Iowa, 122 one-quarter barrels, 171 one-eighth barrels, and 11 cases of beer; that the beer was offered for sale at Keokuk in the original packages by the agent of Gus Leisy & Co. Whereupon the authorities of Iowa seized the beer, under a statute of the State which prohibited the sale of intoxicating liquors within the State of Iowa. The goods were replevined by Gus Leisy & Co., and the question arose whether the *o*mportation and sale of goods by the agent of Gus Leisy & Co., in the original packages, was protected by the commerce clause of the Constitution of the United States.

Fuller, C. J., in delivering the opinion of the court, took occasion to refer to all the deliverances of the court in previous cases, and arrived at the conclusion that the Iowa statute was obnoxious to the Constitution of the United States, and that Gus Leisy & Co. had the constitutional right to import beer from their brewery at Peoria, Ills., to Keokuk, in the State of Iowa, in the *ro*-ginal packages, and there store it and from the storehouse sell it in the original packages to the citizens of Iowa. This case finally established the doctrine laid down by Chief Justice Marshall in the case of Brown *vs.* Maryland, and places the Supreme Court of the United States in absolute accord with the deliverances of that great judge. The court distinctly holds that the beer, being the subject of lawful commerce, the importer from Illinois not only had the right to import his goods into the State of Iowa, but to there store them in the original packages, and sell them in the original packages, through the instrumentality

of an agent; that such transaction was protected by the Constitution of the United States, and that the authorities of the State of Iowa could not interfere with the importer, as long as the beer remained in the or-ginal packages, and was not commingled with the mass of property in the State of Iowa. Justices Gray, Harlan and Brewer dissented in this case, Judge Grey delivering an
169 elaborate dissenting opinion. However, the controversy between the majority and the minority of the court did not turn upon any question material to this controversy.

In the cases known as the License cases, reported in 5 Howard, 504, it was held, by a majority of the court, that a State statute prohibiting the importation into a State of vinous or spirituous liquors, in the absence of legislation by Congress, would be upheld as not in conflict with the commerce clause of the Constitution of the United States, on the ground that it was a proper exercise of the police power of the State. The License cases were elaborately reviewed by Fuller, C. J., in the case of Leisy *vs.* Hardin, and he demonstrated that the Supreme Court had not only overruled, but had "overthrown" the doctrine laid down by the majority of the court in those cases.

Justice Grey, delivering the opinion of the minority in Leisy *vs.* Hardin, took issue with the Chief Justice upon this question, and maintained that the State of Iowa might, in the exercise of its police power, prohibit the sale of beer in that State, even though it was offered for sale in the original packages, and adhered to the doctrine laid down in the License cases.

However, no one will contend that nails, staples, barbed and smooth wire are not legitimate subjects of interstate commerce, and all will concede that they are not only legitimate, but necessary and beneficent, subjects of commerce. Consequently the doctrine for which we contend not only clearly falls within the spirit, but within the very letter of the law, as laid down by the Supreme Court in its latest and most elaborate deliverance in the case of Leisy *vs.* Hardin.

An attempt was made in the court below to distinguish the case of Leisy *vs.* Hardin from the case now under consideration, by insisting that the statute of Iowa brought into question in that case, was an attempted exercise of the police power of the State, and
170 that the decision in Leisy *vs.* Hardin had reference to a law passed as a police regulation, whereas the tax resisted in this case was assessed upon property under a general law taxing all personal property in the State alike. This distinction is not well taken, for immediately following the case of Leisy *vs.* Hardin, the court decided the case of Lyng *vs.* The State 135 U. S. 161.)

In that case Lyng was arrested and prosecuted because he failed to pay a tax required to be paid by the authorities of Michigan for selling wholesale brewed and malt liquors. He defended on the ground that the beer belonged to a firm doing business in Green Bay, in the State of Wisconsin, which was engaged in the manufacture of lar*ge* beer under the firm name of Hagemeister & Son; that quantities of their beer were shipped and stored in Michigan

in warehouses at Iron river, to be there disposed of. Lyng was employed by these brewers as their agent, on a regular salary, to look after their warehouse, to take orders for and deliver beer to the purchasers in quantities exceeding three gallon, and to collect and remit the proceeds of such sales to Hagemeister & Son. Lyng sold and delivered the beer in the original packages to a number of citizens of Michigan, but in no other form, and the question arose whether Lyng, or the brewers that he represented were liable to pay a tax for carrying on their business. Chief Justice Fuller, delivering the opinion of the court, immediately after the exhaustive opinion in Leisy *vs.* Hardin, said:

"We have repeatedly held that no State has the right to lay a tax on interstate commerce, in any form whatever, either by way of duties laid on the transportatton of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

In the same case, he further said:

171 "The right of importation of ardent spirits, distilled liquors, ale and beer, from one State into another, includes, by necessary implication, the right of sale in the original packages at the place where the importation terminates, and that the power cannot be conceded to a State to exclude, directly or indirectly, the subjects of interstate commerce, or by the imposition of burdens thereon to regulate such commerce, without congressional permission. The same rule that applies to the sugar of Louisiana, the cotton of South Carolina, the wines of California, the tobacco of Maryland and Connecticut, or the products, natural or manufactured, of any State, applies to all commodities in which a right of traffic exists, recognized by the laws of Congress, the decisions of the courts, and the usages of the commercial world."

In the case of Schollenberger *vs.* Penn. (171 U. S., 1), where, as before stated, a ten-pound package of oleomargarine was imported from a sister State into the State of Pennsylvania, the Supreme Court of the United States, Judge Peckham delivering the opinion of the court, reviewed at length the cases, and expressly reaffirmed the doctrine laid down in Leisy *vs.* Hardin, holding that the ten-pound package was an original package of commerce, and could be sold in Pennsylvania to a citizen of that State, free from any burdens which Pennsylvania might attempt to impose upon it.

It is submitted that the case now before the court clearly falls within the doctrine of the cases cited. Not only did the products of appellee come to Tennessee in the original packages, but they remained, until delivered to the customers, distinctly separate from the property of the State. The fact is, the case under discussion is even stronger than that of Leisy *vs.* Hardin, because the goods shipped from Illinois to Iowa, reached their final destination at Keokuk, and were there offered for sale, and, in this case, the products of appellee were not offered for sale at Memphis, and

had not reached their final destination when the tax was assessed.

172 If the products of appellee had been shipped by it to the Patterson Transfer Company, to be stored at Memphis, and kept in the warehouses of the Patterson Transfer Company until they were sold in the original packages by the Patterson Transfer Company to customers who came and bought them in the open market, then, in that case, we would have an application of the exact doctrine laid down in Leisy *vs.* Hardin. But we not only have a case for the application of that doctrine, but for the application of another principle which will be hereafter referred to.

Since the decision of the Supreme Court of the United States in Leisy *vs.* Hardin, numerous cases have arisen in the State courts in which the principle on which we insist was recognized.

In the case of Turner *vs.* The State (56 S. W. Rep., 834.), recently decided by the court of criminal appeals of Texas, it seems that the agent of a firm in Omaha, Neb., was employed to sell goods in Texas, and was indicted for failure to pay what was known as the "occupation tax." The goods were shipped by the firm in Omaha, packed in boxes, barrels, crates, etc., and were consigned to the order of the firm at Wichita Falls, and, when they arrived, the goods were delivered directly from the car to the persons to whom the agent had sold them. The packages were not marked with the names of each purchaser, but each package was marked with the article and the amount it contained. The company notified the purchaser of the time and place to call for his goods. The first coming was served first, and so on, until all the *the* orders were filled for which they had goods, and regardless of whether the firm had enough goods in the car to supply all the orders that had been taken or not. The court held that this traffic was interstate commerce, and that the Federal Constitution inhibited any tax being imposed on such traffic. The Texas court reversed a former ruling and held, on the authority of Asher *vs.* Texas (128 U. S., 129.), that the tax was unconstitutional.

Attention is called to the fact that these goods were not consigned to any particular purchaser, but each package, just as in
173 the present case, was marked to show what its contents were, and they were delivered in the original packages to the purchasers, no purchaser taking any particular package, but each purchaser taking a package in fulfillment of his contract of purchase.

In the case of Kirkpatrick *vs.* The State (60 S. W. Rep., 762.), the court of criminal appeals of Texas, as recently as 1901, recognized and followed this doctrine. In that case a corporation manufacturing buggies in the State of Iowa, shipped buggies in carload lots into Tarrant county, Texas, where they were peddled out to the customers of the corporation by an agent of the corporation and in the name of the corporation. It seems that the agent took these buggies through the country and peddled them out to the customers. This was held to be interstate commerce, and the attempt of the commis-

sioners, court of Tarrant county to levy a county tax on the buggies, was held to be unconstitutional.

It will be observed in this case, that no particular buggy was shipped to any particular customer; but the buggies on their arrival in Tarrant county were peddled out by the agent of the corporation to such purchasers as chose to buy them, and where the customer required a different kind of buggy from any on hand, then his order was taken, and sent to the manufactory in Iowa, where the buggy was made according to the order, and shipped to the customer.

The case of Robbins *vs.* Shelby County Taxing District (120 U. S. 429), is the leading case followed by the Texas court. The taxing district imposed a tax of ten dollars per week, or twenty-five dollars per month on all drummers offering for sale or selling goods, wares or merchandise in the city of Memphis. Robbins represented a house in Cincinnati, and was engaged in selling the goods of his house by sample. It was held that the business in which he was engaged was interstate commerce. In this case it was insisted that the tax was valid, because there was no discrimination made between domestic and foreign drummers—those of Tennessee
174 and those of other States—and that all were taxed alike.

The court held that this did not meet the difficulty, and that interstate commerce could not be taxed at all, even though the amount of the tax should be laid on domestic commerce, or that which is carried on solely within the State; citing the State freight tax case (15 Wallace, 232.).

The Robbins case was followed by the case of Le Loup *vs.* The Port of Mobile (127 U. S. 641), and the case of Asher *vs.* Texas (128 U. S., 129).

The doctrine is now too firmly established to be questioned, and it has been expressly recognized by this court.

See:

State *vs.* Scott, 14 Pickle, 254.
Hubbard *vs.* The State, 7 Pickle, 669.

The case of French *vs.* The State (58 S. W. Rep., 1015), decided in 1900, by the court of criminal appeals of Texas, more than sustains our position, and goes to the extent of holding that where a person traveling in a two horse wagon was the agent of a corporation having no office in the State of Texas, for the sale of organs which were shipped from such corporation to the agent, and by him delivered to the purchasers at their various places of residence from the wagon, the purchasers *if* each instance paying for the organs in cash, and notes made payable to the corporation, the fact that the agent sold an organ in one instance which had previously been brought into the State, and left at the house of another, and which he got from the house and delivered to the purchaser, did not render the agent amenable to the State "occupation tax law," prohibiting peddlers from selling goods within the State without a license, since the fact that the property had been shipped into the State and deposited with a bailee, instead of being delivered at once to the purchaser, did not,

in the least, render it a subject of interstate commerce. The court said:

"If interstate commerce protects an article of traffic between the States, in transit, and after its arrival at the warehouse, and
175 until it is sold therefrom and delivered thence to the purchaser by the seller, who acts as the agent of the foreign company, it is difficult to see how the same article will not be protected where the agent of the foreign company carries it around with him, and where he finds a purchaser, then sells and delivers it to such purchaser. It is not the vehicle, as we take it, that gives character to the traffic; but it — the fact that the property has not become commingled with the common mass of the property of the citizens of the State; and, if this is not done in this case until a sale and delivery by the foreign company from its warehouse, we fail to see how it becomes mingled with the mass of property of the citizens of the State, until it is sold by the agent of the foreign company to the purchaser, from his wagon. If it is a sale in one case that determines its character as interstate commerce, we think it equally does so in the other."

See, also, Talbot *vs.* The State (44 S. W. Rep., 1091).

It remains to refer briefly to three or four cases cited by learned counsel for appellant. The opinions of the Supreme Court in Woodruff *vs.* Parham (8 Wallace, 123), and Hinson *vs.* Lott (8 Wallace 148), are not in accord with its subsequent deliverances. It is proper to observe that Justice Miller, who delivered the opinion of the court in these cases in 1868, more than twenty years thereafter concurred with the majority of the court in the opinion delivered in Leisy *vs.* Hardin, and in Lyng *vs.* The State.

In the case of Woodruff *vs.* Parham it was held that a uniform tax imposed by a State on all sales at auction, whether made by a citizen of the State, or a citizen of some other State, and whether the goods sold were the produce of the State enacting the law, or of some other State, is valid, and the same principle was applied in the case of Hinson *vs.* Lott, where a uniform tax was imposed alike on all liquors brought into the State from another State,
176 and on liquors produced in the State. It seems to us that these cases are in conflict with the leading case of Brown *vs.* Maryland, and the doctrine announced in Leisy *vs.* Hardin, Robbins *vs.* The Taxing District, and other cases. Judge Marshall held that the principle applied as well to goods imported from a sister State as to goods imported from a foreign country, and the attempted qualification of this doctrine in Woodruff *vs.* Parham has not been followed by the court. The principle there applied was expressly negatived in the case of Robbins *vs.* The Taxing District and Asher *vs.* Texas, because, in both of these cases, the tax upon drummers was equally applied on drummers resident and non-resident employers, and the Supreme Court, in the former case, expressly decided that this made no difference; that to tax a drummer representing a non-resident employer, was to impose a tax upon the

business of that employer, and was, therefore, violative of the Federal Constitution.

In all the cases we have cited—Leisy *vs.* Hardin, French *vs.* The State, Turner *vs.* The State, and others—there is no distinction to be made, because the property sought to be taxed was the property of a non-resident owner, and because it was an attempt to apply the taxing laws of the State alike to domestic and foreign goods. While we have been unable to find a case directly overruling the case of Woodruff *vs.* Parham, yet we find it to be in conflict with the cases subsequently decided, and, therefore, by implication, overruled.

In Asher *vs.* Texas (128 U. S., 129), the court expressly decides that a previous decision, whether or not mentioned or commented on, must be regarded as overruled, if in conflict with the subsequent deliverances of the court.

If the doctrine was recognized and established that all taxes levied by authority of a State on goods brought within the State, was valid, simply because the law did not discriminate against the importations from other States, then it would be within the
177 power of the several States to practically destroy interstate commerce. Other States could paralyze the sugar industry of Louisiana by enacting general laws imposing a tax of five cents a pound on sugar, whether grown at home or in some other State. The cotton industry could, in like manner, be crippled by all the States north of the cotton belt passing general laws taxing all cotton found within the State five cents a pound. So with the wines of California, the rice of South Carolina, the tobacco of Connecticut, the hemp of Missouri, the oranges of Florida and the products of other States.

There are two cases on which learned counsel for appellant rely. We refer to the case of Brown *vs.* Houston (114 U. S., 623), and Pittsburg & Southern Coal Company *vs.* Bates (156 U. S., 577). These cases involve the same principle, and, practically, the same question.

In Brown *vs.* Houston, the court held that where coal mined in Pennsylvania was sent by water to New Orleans to be sold in open *am*rket at that place on account of the *wo*ner in Pennsylvania, it became commingled, on arrival there, with the general property of the State of Louisiana, and was subject to a tax under the general laws of that State.

In the case of Pittsburg & Southern Coal Company *vs.* Bates, the court held that coal shipped by the owners at Pittsburg in their barges to Baton Rouge, La., for the purpose of being sold there, or sent thence to supply orders, and moored at Baton Rouge in the origi*an*l barges in which it was shipped at Pittsburg, is subject to a local tax as a stock in trade, and such imposition of taxes violates no provision of the Constitution of the United States. In that case, Judge Field, delivering the opinion of the court, said:

"The decision of the court in Brown *vs.* Houston seems to be conclusive of the case now before the court. The property in this case, as in that, still belonged to the original owner in Pennsylvania; but

is brought on the navigable waters of the United States in
178 boats and barges to Louisiana, for the purpose of sale, and is subject to taxation, as any other property of the citizens of the United States is subject when it becomes incorporated into the bulk of the property of Louisiana."

These cases can be distinguished from the one under consideration in two important particulars. In the first place, a barge loaded with coal, cannot be, in any proper sense, a package of commerce. There are some kinds of property that cannot be confined in a package. A barge of coal, a car of gravel, or of iron or silver ore, or of limestone, or marble, or of crossties, could not, in any proper sense, be deemed a package. They are not the original packages referred to in the decisions. For instance, it would not be proper to say that a horse, a cow, a hog or a sheep was a package. Consequently, if a drove of horses, of cattle, or of hogs were imported from one State into another, and there offered for sale, they could not be regarded as the original packages of commerce; but, on the contrary, when offered for sale, would be subject to taxation, because they had become commingled with the property of the State to which they were imported. However, a sack of corn, a barrel of whisky, a keg of nails, a keg of staples, a reel of wire, a coil of wire, a box of shoes, or other articles of commerce, are the properties designated as packages.

If it had been practicable from a commercial standpoint to have loaded the barges with coal at Pittsburg, to have enclosed the coal in the barges and marked the barges as containing so much coal, and in that form the barges had been floated to New Orleans, and the barges containing the coal had been there offered for sale in that form, the court would doubtless have held each barge an original package of commerce; but this was not the case, and, consequently, when the coal reached Louisiana, and was offered for sale, not being in the original packages, it at once became incorporated into the general property of the State, and became subject to taxation.

179 There is another important distinction, and it is, that the coal imported into Louisiana from Pennsylvania in barges, had arrived at its destination, and was there for sale in the open market. The court refused to hold, in the cases referred to, that the barges were *packages*, and then the decisions rested upon the express ground that the coal had arrived at its destination, and was for sale in the open market.

In the case under discussion, there is no question, under the authorities, in regard to the packages. No court could hold, following the adjudicated cases, that a keg of nails, or a keg of staples, or a reel or a coil of wire, each keg, reel and bundle weighing a hundred pounds, and each keg and each bundle so marked as to show exactly its contents, is each not an original package, within the meaning of the cases referred to.

Then, again, the goods of appellee were, in no sense, consigned to Memphis for sale; but, on the contrary, were sent there for the express purpose of assortment, distribution, delivery or reshipment.

They were not held out for sale. They were not in the open market, and all the goods had been practically sold before the left the manufactories to the customers of the company throughout the Southwest. So there is no parallel between the case in hand and the cases relied on by counsel for appellant.

The Goods were in Transitu.

We now come to the discussion of another phase of this controversy. We have heretofore attempted to show that where goods were shipped from one State into another in the original packages, they might, when they come to the point of their destination in another State, be stored in warehouses, and sold in the original packages to the citizens of that State into which they are imported, and remain protected by the commerce clause of the Constitution of the
180 United States, until they are actually sold, and commingled with the other property of the State.

The principle for which we insist was applied in the case of Pabst Brewing Co. *vs.* Terre Haute (98 Fed. Rep., 330). In that case it appears that a non-resident brewing company established a depot at Terre Haute, Ind., for the storage of its beer in the original packages, and employed an agent to sell the same in such packages to customers in Indiana. An attempt was made to require a license tax to be paid by the brewing company, and it was held that the ordinance was void, as an attempt to regulate interstate commerce. This is directly in accordance with the decision of the Supreme Court of the United States in the case of Leisy *vs.* Hardin, already referred to, and aptly states the doctrine on which we rely.

But there is another principle applicable to this case, and it applies, whether the goods were shipped in the packages of commerce or, as the coal was shipped, in barges to New Orleans, as stated in the case of Brown *vs.* Houston. It is, that whenever an article of commerce has begun to move from one State to another, commerce in that commodity among the States has commenced. This principle is recognized by all the authorities, and, in fact, is admitted in the answer in this case. The answer concedes that had not the goods come to the place of their final destination when they reached Memphis they were under the protection of the Constitution of the United States, and could only be taxed wh-n they had come to a place of rest.

The Supreme Court of the United States, in the case of Coe *vs.* Errol (116 U. S., 517), states the doctrine. In that case it appears that logs were cut in the State of Maine, and were collected from the surrounding country at a town serving as an entrepot for that particular region, with the intention of shipping them beyond the limits of the State of Maine. The Supreme Court held that the logs were not in the course of transportation, and were not under the protection of the Federal Constitution; but expressly decides
181 that *that* if they had been delivered to the common carrier, though detained for a time within the limits of the State by

low water or other causes of delay, or were detained for such causes anywhere on the line of transportation, they would be the subjects of commerce, and under constitutional protection.

In the case of Daniel Ball (10 Wallace, 557), the Supreme Court said:

"Whenever an articles has begun to move as an article of trade, from one State to another, commerce in that commodity between the States has commenced."

Again, in the case of Howe Machine Co. *vs.* Gage (10 Otto 676), the court holds that the power of Congress applies to articles taken from one State into another, and the articles continue under the protection of the Constitution of the United States, until they become commingled with, and a part of, the property of the land.

The mere statement of the proposition places it beyond the domain of legitimate discussion. To say that goods in the process of transportation from Little Rock, Ark., to Jackson, Tenn., would be subject to taxation, because they were found in the depot at Memphis, is so preposterous, and so clearly in violation of the commerce clause of the Constitution, that it is deemed unnecessary to further discuss the general principle. The only question to determine is whether or not the products of appellee had reached their destination. Was Memphis the end of their journey?

In the case of Standard Oil Co. *vs.* Treasurer (89 Ind. 1), the supreme court of that State held that the personal property of a non-resident of Indiana, situated at the railroad depot, awaiting shipment to the residence of the owner, had no permanent situs in Indiana, and was not taxable in that State. This was a case where the Standard Oil Company had purchased a number of staves, which were stored at a station on a line of railroad, to be shipped to Cleveland, O., and there to be used in making oil barrels. While the staves were so stored at the station, they were assessed for
182 taxes in Indiana, and the supreme court of that State held that they were *in transitu*, and, therefore, protected from taxation under the Federal Constitution.

In the case of The State *vs.* Corrugan (39 N. J., 35), the supreme court of that State held that coal mined in Pennsylvania, and shipped to Port Johnson, on the Atlantic seaboard, and there stored in bins to be reshipped to New York, was *in transitu*, and not subject to taxation. The court held that the coal in the bins was not there for sale, but stored there for the purpose of transportation and reshipment, and, while so stored, and before its reshipment, was not subject to taxation. This case is in accord with the doctrine laid down by the Supreme Court in Coe *vs.* Errol (116 U. S. 517), which held that goods in the course of transportation through a State might be detained within the State by low water, or other causes, and while so detained, would not be the subject of taxation, because the goods were *in transitu*.

See, also, State *vs.* English, rec'r, 5 Broom (N. Y.) 425.

These cases are directly in point, and conclusively show that Tennessee cannot tax lawfully the property of appellee, while it is *in transitu*. The property was brought to Memphis, not for sale, but, as already stated, for assortment, distribution and delivery to the purchasers here in Memphis, and to the various lines of railroads and steamboats, consigned to customers beyond the limits of Tennessee.

It must always be borne in mind that when the products of appellee left their manufactories, they were contracted to be sold, and were sold to the jobbers throughout the Southwest, and, from the moment they left the manufactories, they were in the hands of common carriers, until they reached their ultimate destination, and we insist that, up to the moment the goods were delivered to the purchasers, either in Tennessee or elsewhere, they were, in point of fact, *in transitu*. It is as obnoxious to the Constitution of the United
183 States to attempt to tax these goods in the warehouses of the Patterson Transfer Company, while temporarily there for assortment and distribution, as it would be to tax goods situated in the various railroad depots at Memphis.

It is a Discriminating Tax.

Finally, we insist that the tax assessed by the county court clerk operates as a discrimination against the manufactured products of other States. The constitution of Tennessee, article 2, section 30, provides:

"That no articles manufactured of the produce of this State, shall be taxed, otherwise than to pay inspection fees."

Section 2553 of Shannon's Code provides that foreign corporations shall be entitled to all such exemptions from taxation which are now or may hereafter be granted corporations of this State, for the purpose of encouraging manufactories.

What does the word "produce" mean?

Mr. Webster, in his Unabridged Dictionary, among other definitions, defines the verb "produce" to mean: "To give birth or form to, to manufacture, to make, as a manufacturer produces excellent wares."

The noun "produce" he defines as follows:

"That which is produced, brought forth or yielded; product, yield, proceeds, result of labor, especially agricultural labor; hence, specially, agricultural products."

This court, in an unreported case, recently decided at Nashville, held that lumber manufactured out of logs cut from the forrests of Tennessee, was not subject to taxation. Justice Wilkes, who delivered the opinion of the court, while it was not necessary in that case to go to the length of adjudicating that the finished product was exempt from taxation, clearly demonstrated that such
184 was the case. It is very clear, from his reasoning, that if the manufacturer of lumber from the logs had proceeded further

in the process of manufacture, until the lumber had been converted into the finished product, such as tables, wardrobes, or any other articles of furniture, such finished products, under the constitution of Tennessee, would not be subject to taxation, while in the hands of the manufacturer.

We insist that nails, staples, smooth and barbed wire, manufactured out of the produce of the iron mines of Tennessee, are clearly protected from taxation by the article and section of the constitution of Tennessee above referred to. Such nails, staples, and wire, manufactured in Tennessee, from the "produce" of Tennessee mines, would not be, in the hands of the manufacturer, subject to taxation, and would only be liable to taxation, when the same were sold by the manufacturer, and thereby became commingled with the other property of the State. We insist that iron is as much the "produce" of the soil of Tennessee as cotton, corn, wheat, lumber, or any other produce of the soil. We speak of the products of the mine as we do of the products of the farm, and whereever either the products of the mine or the farm go through the process of manufacture in Tennessee, the manufactured products are not subject to taxation under article 2, section 30 of the constitution of the State.

The evidence, which is in the form of an agreement of counsel, shows that there are large deposits of iron ore in Tennessee, and that there are a large number of furnaces in Tennessee engaged in the production of iron. It does not appear that the iron so produced is being converted into nails, staples or wire; but it is the raw material produced from the soil of Tennessee, out of which these articles are manufactured.

Now, we submit that, in this case, we have an attempt to levy and collect a discriminating tax, to be paid by the manufacturer on articles manufactured from iron produced in other States, while it is
-till in the possession of the manufacturer. If the nails,
185 staples and wire had been manufactured out of iron produced from the mines of Tennessee, it is clear that they would not be subject to taxation, and yet a discriminating tax is levied on like products, in the hands of the manufacturer, coming from other States, and brought into this State. This makes a most flagrant violation of article 1, section 8, subsection 3, of the Constitution of the United States, which empowers Congress "to regulate commerce among the several States, etc."

In order *the* emphasize the discriminating character of this tax we call attention to article 2, section 28, of the constitution of Tennessee, which provides:

That "the direct product of the soil, in the hands of the producer, and his immediate vendee," shall be exempt from taxation.

It appears from the testimony of Mr. Young, the county tax assessor for Shelby county, whose business it is to assess personal as well as real property, that no lumber is taxed which is produced from logs cut from the forrests of Tennessee, and he further testifies that while Memphis receives annually about 600,000 bales of cotton, which principally comes from the States of Arkansas and Missis-

sippi, not a bale of it is ever taxed. It is perfectly plain that to tax lumber manufactured from logs cut in the forrests of Mississippi and Arkansas, and imported into the State of Tennessee, would be a discriminating tax; because this State exempts lumber from taxation manufactured in this manner, cut from the forrests of Tennessee. The same principle applies to cotton. Cotton cannot be taxed in Tennessee, because the constitution of Tennessee prohibits the taxation of the products of its soil "in the hands of the producer aand his immediate vendee." This, of course, applies to the cotton grown in Tennessee, and not elsewhere. No attempt is made to tax cotton which is the product of the soil of Mississippi, Arkansas, or Alabama, for the reason that such a tax would be a most flagrant discrimination and obnoxious, in the last degree, to the Federal Constitution.

186 Apply this principle to the attempt made to tax the products of appellee, and we have a case just as flagrant, and just as obnoxious to the commerce clause of the Constitution of the United States.

It will not do to say that this tax was assessed under a general law, which applies as well to property in Tennessee as to property coming from some other State, for it will be conceded that if the nails, staples and wire were manufactured from iron produced from the mines of Tennessee, they would not be subject to taxation otherwise than to pay inspection fees.

The exemption of lumber from taxation, manufactured from Tennessee logs, is exactly in point; but the cotton illustrates in two ways, the principle for which we contend. Even though cotton was liable for taxes in Tennessee, the cotton of other States coming into Tennessee in bales, the bales being the original packages of commerce, in which it is always shipped, it would not be subject to taxation as long as the cotton remained in the bales and was sold in the bales. It comes into Tennessee in the original packages; is sold and delivere- in the original packages, and transported from the State in the original packages to northern markets and to foreign countries. Consequently, in this view of the case, it is not subject to taxation, and the application of the doctrine of the case of Leisy *vs.* Hardin absolutely protects it from interference, and the same principle necessarily applies to the products of appellee shipped into Tennessee, in the original package, and disposed of in like manner.

But cotton is exempt from taxation on another ground. As cotton grown in Tennessee, "in the hands of the producer and his immediate vendee," is exempt from taxation, it follows that cotton in the hands of the producer in Arkansas, Mississippi or Alabama, or his immediate vendee, is likewise exempt, because to tax his cotton would be to discriminate against the importations from other States, and, so, as nails, staples and wire, manufactured from the produce of Tennessee mines, would be exempt from taxation, it fol-

187 lows, that nails, staples or wire manufactured beyond the limits of Tennessee, out of iron produced in other States, must necessarily be exempt from taxation, because to tax them would be

to discriminate against the products of other States imported into this State.

In the case of Welton *vs.* The State of Missouri (91 U. S., 275), the Supreme Court of the United States expressly holds that the interstate commerce clause of the Constitution of the United States, protects property from taxation, even after it has entered the State, and becomes commingled with the property of the State, and holds that no burden shall be imposed upon it by reason of its foreign origin.

See also, Minneapolis Brewing Co. *vs.* McGillis (104 Fed. Rep. 258).

We may recite many authorities under this head, but this is another proposition so palpable plain that it will not be seriously controverted by learned counsel for appellant.

Conclusion.

If the prosperity of the whole country depends on the freedom of interstate commerce from interference on the part of the several and independent States composing the American Union, it may be remarked, in conclusion, that the prosperity of Tennessee is especially so. Her borders nowhere touch the sea, and the commerce of Tennessee, beyond the limits of its own territory, is absolutely dependent on the safeguards of the Federal Constitution. Memphis is also peculiarly situated. It is practically in the corner of four great States, viz: Tennessee, Mississippi, Arkansas and Missouri. There is no city of its size in the Union which is more directly interested in interstate commerce. It is especially interested in the right solution of every problem affecting interstate trade.

Appellee is the citizen of another State engaged in interstate commerce, and the same law applicable to any other citizen will
188 be applied to it. Aside from this, the arrangement it has made in the city of Memphis, as shown by the proof, has resulted advantageously to the trade of Memphis, and greatly to the convenience of its merchants, and also resulted in giving profitable emploument to many of its citizens.

From every point of view the case is one of merit.

The learned chancellor before whom the case was tried carefully considered the questions presented in the record, and embodied his conclusions in a written opinion, which we reproduce as an appendix to this brief.

If, as the chancellor holds, a merchant is not a manufacturer, and, therefore, that the assessment of a merchant's tax against appellee is illegal and void, it is conceded that the discussion of the last proposition is not pertinent. However, if it be true, as insisted by appellant, that a manufacturer of products can be taxed as a merchant, because he sells such products, then, in that case, it is pertinent to insist that to tax the products, directly or indirectly, in the hands

of the manufacturer, when imported from another State, would be a discriminating tax.

PATTERSON, NEELY & HENDERSON,
Solicitors for Appellee.

189 APPENDIX.

Opinion of Chancellor Heiskell.

Prior to the 1st of February, 1900, the complainant distributed its manufactured products throughout the Southwest, from Louisville, Ky.; Memphis, Tenn.; Greenville, Vicksburg and Natchez, Miss.; and New Orleans, La. About that time, complainant becoming convinced that Memphis was about the most available point for the assembling and distribution of its manufactured products throughout the Southwest, entered into an agreement with the Patterson Transfer Company of this city, by which said transfer company was to receive said products at Memphis, and assort them so as to separate the different kinds of nails and staples, and the different kinds of wire, and then deliver the same, either to the jobbers at Memphis, or to jobbers beyond the limits of Tennessee, over the various lines of railway running into Memphis. The goods being manufactured at different points, it was convenient, if not absolutely essential, to have some place at which said goods could be assembled, and from which they could be distributed. In order to facilitate the handling of these goods, the transfer company rented several cotton sheds, in which the goods were stored for assortment and distribution. The sheds were used for this purpose only, no other goods but those of the complainant being stored therein.

Goods Not Sold Here.

The Patterson Transfer Company is a common carrier, and did not know the price of the goods, sold none of them and received no money from sales. The steel and wire company sent out canvassers, who took orders for so many kegs of nails or staples, or so many reels of barbed wire, or so many coils of smooth wire, stipulating that the purchaser could, within a specified time (sixty days
190 to *to* four months), select the kind of nails, staples or wire he desired delivered to fulfill his contract. This was done by writing out a specification, showing what he wanted, and forwarding the same to the Chicago office, from which a copy was sent to the Patterson Transfer Company, so that the goods could be shipped to fill the order.

For the accommodation of the Memphis jobbers, a somewhat different method of business was adopted. The Memphis merchant would make out his specification, but, instead of sending it direct to the Chicago office of the steel and wire company, he would deliver

to the transfer company, who would deliver the goods as specified at once, attach the dray receipt for same to a copy of the specifications and forward to the Chicago office, and that office would make out an invoice and send directly to the jobbers. About 10 per cent. of the whole volume of business was transacted with Memphis jobbers. In some exceptional cases Taylor, the agent of the complainant, sold goods to Memphis merchants, and the goods were delivered by the transfer company upon specifications made out by Taylor, and in a certain number of cases, in which Memphis merchants had exhausted their contract, the transfer company was instructed by the complainant to deliver goods upon the specifications of these merchants. These exceptional sales are shown to be about one-fourth of the per cent. of business transacted with the Memphis jobbers.

The great bulk of the goods brought to Memphis is brought by barges, and at a time when the water in the rivers will permit the passage of barges. As to just what proportion of the goods are sold before they reach Memphis, and what portion are shipped in advance of sale, in order to take advantage of a favorable stage of water, is not entirely clear; but I think this is not very material.

Were Original Packages.

191 The goods are put up and shipped, the nails and staples in kegs, which weigh each one hundred pounds; the smooth wire in coils, weighing one hundred pounds, tied by wire; the barbed wire is put up in reels containing a hundred pounds of wire, and none of these packages are ever broken until they are delivered by the transfer company.

Complainant's Contention.

The complainant relies on four contentions to defeat this tax:

1. The American Steel & Wire Company is assessed to pay taxes as a merchant doing business at Memphis. It is not a merchant, therefore the assessment is illegal.

2. The assessment is void because in violation of article 1, section 8, subsection 3, of the Constitution of the United States, which empowers Congress to regulate commerce among the several States. That the goods in question were shipped and sold in the original packages in which they were put up by the manufacturer, and, therefore, no tax can be imposed upon the goods, upon complainant as owner, or upon the business of selling same.

3. The goods are *in transitu*, not having reached their destination, and, therefore, under principles of interstate commerce, protected from taxation.

4. The tax is void, because a tax discriminating against the products of other States. The constitution of Tennessee, article 2, sec-

tion 30 provides: "That no article manufactured of the produce of this State, shall be taxed otherwise than to pay inspection fees." Therefore, articles manufactured from the produce of another State, and imported into this State, cannot be taxed. That is to say, the articles manufactured from the product of another State cannot be taxed otherwise than are the articles manufactured from the products of this State.

192 *Defining Questions.*

Is the complainant corporation a merchant? It is conceded by counsel for defendant that this assessment cannot be maintained if complainant is not a merchant, even though the property might be liable to a tax imposed in a different way. In the case of The State *vs.* Smith (5 Hum., 394), our supreme court, quoting from Tomlin's Law Dictionary, defines a merchant to be one who follows the business of buying and selling, as a pursuit and vocation by which he makes his living.

The act of 1901, chapter 174, section 27, page 239, defines a merchant as follows: "The term merchant, as used in this act, includes all persons, co-partnerships or corporations engaged in trading or dealing in any kind of goods, wares, or merchandise." * * *

Section 23 of the same act provides for the assessment of manufactoring corporations, and directs the assessment of manufactured articles on hand, unless shown to be made from the products of this State.

Section 24 provides for the assessment of foreign manufactoring corporations having branch factories or business in this State.

Section 30 provides that the county court clerk shall back assess in case of merchants, and in all other cases, the county trustee.

The words, "trading and dealing," convey the idea of buying and selling, and not of selling alone without buying. The farmer is not said to trade or deal in what he grows, nor the manufacturer in the articles manufactured. The meaning is made stronger by the fact that the statute provides for the assessment of the manufacturer as such, and not as a merchant. Yet he, of course, sells his manufactured articles, and is expected to do so.

It is said that one may be both a manufacturer and a merchant, and liable to a different tax in each capacity. This is clearly true; but merely selling articles manufactured, in the original
193 packages, and buying nothing to sell again, does not make a merchant of a manufacturer.

Are Not Merchants.

I think it is clear that the complainant is not a merchant, either within the definition of the lexicographers, or within the meaning of the assessment law. I think it is equally clear that complainant is a manufacturer.

It is insisted by counsel for defendant that the record did not show that complainant was a manufacturer. The bill alleges the fact; the answer admits it, and every witness who knows anything about complainant's business outside of the State testifies to the fact, and no witness deposes to the contrary.

State Must Refund.

The facts must be taken as made out, Being manufacturers, and not merchants, and being assessed as merchants and not as manufacturers, the assessment is invalid, and the tax cannot be enforced in the case of the city and county, and in the case of the State having been paid, must be recovered by complainant.

Would Violate Constitution.

This is conclusive of the whole case. Still, the court was urged in argument to pass upon all the questions raised. I do not think the court should be asked to decide anything more than is necessary to a determination of the case upon the facts as found. That is, to express an opinion as to what the result would be upon a different state of facts. I will, however, say this much: That, being a manufacturer, selling its manufactured goods in the original packages of manufacture, a tax upon the business, if authorized by the law of Tennessee, would be invalid under the interstate commerce clause of the Federal Constitution. But whether or not the property
194 itself would be exempt from a tax, as property, I decline to say. In the case of Brown *vs.* Houston (114 U. S., 622), and Coal Co. *vs.* Bates (156 U. S., 577), coal shipped in barges from other States to Louisiana for sale was taxable as the property of the non-resident owners under the laws of Louisiana. It has been held, in numerous cases, where a non-resident has an agent in the State selling the goods of the non-resident upon orders by samples, that the agent cannot be compelled to pay a license or occupation tax.

Precedents Cited.

Robbins *vs.* Taxing Dist., 120 U. S., 489, and many other cases.

An agent cannot be taxed upon the business of keeping goods of a non-resident principal on storage for sale.
Ling *vs.* Michigan, 135 U. S. 161.

Nor can the non-resident principal be taxed upon such business.
Pabst Brewing Co. *vs.* Terre Haute, 98 Fed. Rep., 330.

Law Well Settled.

This is as far as any of the cases go, and thus far the law seems to be well settled; but no case is produced in which the property shipped into the State in original packages of manufacture, was stored for sale in said packages, and while thus stored was assessed for taxation as personal property under laws applicable to all personal property in the State.

Counsel for complainant insists that the tax was sustained in Brown *vs.* Houston and Coal Co. *vs.* Bates, because the coal was not shipped in original packages, there being no such thing as an original package of coal, The court, in those cases, does not make this distinction. Still, it may be a sound contention. On the *to*her hand, the question arises whether or not the fact of the occupation of selling, or of seller, being taxed, instead of the property, made any difference in the decision in the cases of which Brewing
195 Co. *vs.* Terre Haute is an extreme instance. That is to say, if in Brown *vs.* Houston the tax had been imposed upon the privilege of selling, and in Brewing Co. *vs.* Terre Haute upon the property in the warehouses, as personal property, would the decisions have been just the same? The question does not arise, and therefore cannot be decided.

Goods Were in Transit.

It is doubly unnecessary to pass upon the third contention of complainant—that the goods in question were in transit, on their way from the non-resident vendor to their vendees in this and other States—because the complainant is not a merchant, and because unquestionably the goods were all shipped and handled in the original packages of manufacture. If the *r*poperty itself had been taxed; if complainant had been dealing as a merchant, or the goods not sold in original packages, it might have been a very material question whether or not the goods had reached their destination; but the facts of this case call for no opinion on the question.

State Constitution Exempts.

As to the last contention urged for complainant, that as the constitution of Tennessee exempts articles manufactured from the produce of this State, it would be discrimination to tax complainant's goods, it may again be said the case does not demand an opinion.

The exemption under the Tennessee constitution applies to such articles only in the hands of the manufacturer, and he is not exempt from a privilege for selling them.

Keith *vs.* The State, 2 Pickle, 134.

A merchant in Tennessee selling articles manufactured from the produce of the State is not exempt from taxation. If, then, the complainant could be taxed as a merchant, there would be no discrimination. Until it is sought to tax complainant as a manufacturer, or the manufactured articles in his hands as a manufacturer, this question of a discrimination tax cannot arise.

196 Supreme Court of Tennessee.

AMERICAN STEEL & WIRE CO., Appellee,
versus
R. A. SPEED, Appellant.

Argument for Appellant.

James M. Greer and Wm. H. Carroll, counsel for appellant.

Filed May 4, 1903.

JNO. W. BUFORD, *Clk.*

197 In the Supreme Court of Tennessee.

AMERICAN STEEL AND WIRE COMPANY, Appellee,
versus
R. A. SPEED, Appellant.

Argument for the Appellant.

At the very threshold of this controversy there arises for the determination of the court whether or not the appellee is entitled to maintain this bill under that well-settled rule of law applicable to the recovery of money paid on account of taxes. The rule is thus stated by the supreme court:

"Mere irregularities may be passed over without remark, as the suit is an action of assumpsit brought by the plaintiffs to recover back money which they paid to the collector, and the burden is upon them to show that the defendant *ex equo et bono* is bound to refund the amount which they paid. *Indebitabus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff. Where the case shows that it is the duty of the defendant to pay, the law imputes a promise to fulfill that obligation, but the law never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law." Bailey *vs.* R. R. Co., 22 Wallace, 604, 638–639.

The law never implies a promise on the part of the sovereign to repay money that in good conscience it ought to keep, because of

taxes paid over to it, as where the assessment was irregular, or the property of the party paying the taxes was liable for the tax, but upon a different assessment of the property.

198 The question- before the county court clerk and before the State board of equalizers, on the appeal from his decision are correctly stated in the opinion of the State board of equalizers, as follows:

First, "that it (appellee) could not be properly assessed as a merchant; second, that its goods in the warehouses were *in transitu*, and that taxation on them was an interference with inter-state commerce; third, that the constitution of Tennessee is discriminatory in exemption from taxation articles manufactured of the products of Tennessee and in contravention of the Constitution of the United States."

1. The first question was one within the jurisdiction of the assessing officer, and of the State board of equalizers; consequently the affirmance of the judgment of that officer by the State board of equalizers conclusively determined that question, and it is not open in this suit.

Sub-sec. 10 of sec. 39, ch. 435, Acts of 1899.
Sub-sec. 10–11, sec. 38, ch. 174, Acts of 1901.
Ward *vs.* Alsup, 100 Tennessee 750;
And the authorities heretof-re cited.

The statute provides for the d-termination of the question by the assessing officer, for the determination of the question by an appellate tribunal; the appellee availed itself o*g* the tribunal; and that question is by the authorities certainly a closed one on this record, for the act expressly provides:

"The action of a State board of equalizers shall be final and conclusive as to all matters passed upon by the board, and taxes shall be collected upon the valuation so fixed and found by the said board."

By section 32 of the said act, provision is made for the back or re-assessment of property, and in the event of merchant's capotal the jurisdiction to make such assessment is vested in the county court clerk; from his decision an appeal lies directly to the State board of equalizers. Having the p-wer to make the assess-

199 ment, it necessarily embraces the power to determine all the matters essential in order to judicially determine the liability of the person cited to appear and show cause, if any, why he should not be back-assessed upon the capital invested in his business.

2. But independent of the decision of the county court clerk, and its affirmance by the *the* State board of equalizers, it clearly appears that the appellee is liable upon the capital invested in its business as a merchant under the acts of the General Assembly of the State of Tennessee, for the term "merchants" as used includes all persons, copartnerships or corporations engaged in trade or dealing in any kind of goods, wares merchandise * * * whether such goods,

wares or merchandise be kept on hand for sale, or the same be purchased and delivered for profit, as ordered.

Kurth *vs.* The State, 2 Pickle 134–137.
New York State *vs.* Roberts, *infra*, 661.
Price *vs.* Atlanta, 105 Georgia 357–358–365.

The learned trial judge followed the old decisions in Tennessee, holding that a merchant was one who buys to sell again, evidently overlooking the opinion of this court by Judge Lurton in Kurth *vs.* The State, and the applicability of the decision to the statutory provision. For the term "merchant" is by the legislature declared to include all persons engaged in trading or dealing in any kind of goods, etc., and when the dealer, though he manufacture the articles in which he deals, must pay a tax as a wholesale dealer, because he sells to consumers wine manufactured out of grapes produced in Tennessee, it follows that the appellee is a merchant when it keeps large stocks of its manufactured products in Tennessee and sells them in Tennessee, and out of Tennessee, performing its contracts of sale in every instance by making a delivery in fulfillment of its executory agreement from the warehouses in which are its goods in the city of Memphis.

200 There is very little difference in the facts of the case at bar and those stated by the supreme court in New York *vs.* Roberts, *infra*. There the facts were that a Michigan corporation engaged in manufacturing chemical and pharmaceutical preparations in a factory situated in the city of Detroit, had a warehouse and depot in the city of New York, where it kept on hand varying quantities of manufactured products that were sold in original packages. The concern was represented in New York by John Clay, manager, who was paid a salary. The business of selling the manufactured articles was carried on in all respects like the ordinary sale of consigned goods. Clay, in his own name, but for the use of the company, imported crude drugs from foreign countries at the port of New York, which were sent in large part to the Detroit factory for use, but some portions were sold in the original packages in New York. The Michigan concern paid an annual rental for its place of business, employed a force of about fifty persons in New York, and the average stock of goods that was sent from Michigan and carried in New York during the years from 1890 to 1894 inclusive, showed an average of $50,000, and the concern also employed in New York during that period a continuing capital of from $23,000 to $62,000 a year. Upon these facts the comptroller of New York imposed for 1894, and the five years previous, an annual tax based upon the sum of $90,000 as capital employed in the State. The court of appeals of New York affirmed the tax, and the case came on to be heard by the supreme court upon a writ of error to the court of appeals of the State of New York. The decisions of the case will be found reported in 91 Hunn. 158, 149 New York 608, and 171 U. S. 658.

Before proceeding to consider the opinion of the supreme court it is quite in point to consider the course of dealings of the appellee, in

order to ascertain whether or not its goods were within the city of Memphis precisely as were the goods of the Michigan corporation in the State of New York.

201 The American Steel & Wire Company is a corporation by the laws of the State of New Jersey. It did not rent warehouses in the city of Memphis, but it made an arrangement with the Patterson Transfer Company to do that very thing, and there deposited its goods that were shipped by the American Steel & Wire Company, to itself, at Memphis, consisting of barbed wire, smooth wire on reels, nails in kegs, and various other products of the company, to remain in a state of rest until lots of the goods were either sold and delivered in Tennessee to purchasers, or sold outside of Tennessee, to be delivered from the warehouses in Tennessee in fulfillment of the contracts of sale to purchasers who did not reside in the State.

The American Steel & Wire Company had no sales agents in Tennessee, and no sales agents at the warehouses. The method of conducting business was through travelling solicitors, who visited merchants and solicited their patronage; the orders that the solicitor received he turned over to the head office at Chicago; the orders were forwarde- to the manufacturing points of the company, and from time to time barges loaded with the manufactured products were sent to Memphis, where the goods were to be warehoused, and where their transit ceased, for they were invariably put in a State of rest until particular lots of the goods so deposited in the warehouse were applied in fulfillment of sales orders, and invariably the contract was executed by a shipment of the goods from one of the warehouses in the city of Memphis. These warehouses, rented by the Patterson Trnasfer Company, contained the products of the appellee manufactured out of Tennessee, sent into Tennessee, and while in the warehouses by the appellee insured as its property, and when the products reached the warehouses in Memphis they reached their final destination and remained warehoused until sold and appropriated to the several contracts of sale, the deliveries being invariably made from the mass of goods in the warehouse.

202 If the principle applied by the court of appeals of New York is not applicable to this case, we confess our inability to differentiate.

The statute of New York provided that:—

"Every corporation * * * now or hereafter incorporated, organized or formed under, by or pursuant to law in this State, or in any other State or country, except only saving banks * * * shall be liable to and shall pay a tax as a tax upon its franchise or business into the State treasury annually, to be computed as follows.

The case before the courts in New York involved among other questions whether the comptroller erred in deciding that the goods manufactured by said corporation and stored at its depot in New York, are capital employed in said State within the meaning of the statute. Both courts so held affirming the judgment of the comp-

troller. As to the opinion of the court of appeals, Mr. Justice Shiras said:

"The construction put upon the statute of the State of New York by its courts is of course binding upon this court, and that portion of the contention which questions the action of the comptroller on the ground of misinterpretation of the law is thus disposed of."

Our contention is a two fold one on this part, namely, that the statute of Tennessee provides a tribunal, and the judgment of that tribunal, if is misinterprets the law, is binding on this court; and if we are mistaken in this contention, then that the question is upon principle conclusively settled by the decisions of this court and other courts by construction of the statute or a similar statute.

If the American Steel & Wire Company is *not* dealing in goods in Memphis when it sends travelling solicitors all over the country and sells goods that are in Memphis in the warehouse, stored
203 in its name, insured by it as its property, and makes deliveries out of the mass of goods to comply with its contracts, it is somewhat difficult to understand what dealing means.

Of course just as fast as the Supreme Court of the United States decides the question in favor of the sovereign against a corporation or trust of a kindred character to the appellee, human ingenuity will devise some different method to evade the tax, but the substance is always looked to and the sham disposed of.

The property of the appellee, taking the lowest and highest value, from February 1, 1900, to February 1, 1901, adding them together and dividing by 2, that was at rest at Memphis, and from which sales orders were filled, was $72,326; and from February 1, 1901, to February 1, 1902, $166,275; between February 1, 1902, and August 1, 1903, was $196,362, not a dollar of which was listed for taxation, and no report made by the company as the law requires. And accordingly back assessments were made for the year from February 1, 1900, to February 1, 1901, and from the latter date to February 1, 1902, the tax not being due for the subsequent year until February 1, 1903.

The several contracts of sales, called sales orders, were performed in Tennessee, each and every one of them, and are governed by the laws of Tennessee. They were executory agreements until specific property was applied to fill them, and then they became executed contracts by the deliveries made in fulfillment of the obligation of the vendor. And no matter where the order was taken it was a sale of a thing in Tennessee precisely like the sale made by the drummers of the many wholesale houses in the State, who take orders outside of the State; the only difference being that the process in the case at bar is to send the order to the head office, at Chicago; and the direction for delivery to fill the contract then sent to the agent of the appellee at Memphis, and the delivery made out of a mass of goods in the warehouses of the agent of appellee.

204 3. And this brings us to the consideration of the proposition that the provision of the organic law of Tennessee is in conflict with the Constitution of the United States, in that it is dis-

criminatory in favoring manufacturers who manufacture their wares out of the products of the soil of Tennessee, in that it exempts such wares from all taxation, except to pay an inspection fee. This proposition has been mooted a great many times, always to be decided contrary to the contention of the appellee.

Judson on Taxation, section 149.

The Beel's Gap R. R. Co. *vs.* Pennsylvania, 134 United States 232.

New York State *vs.* Roberts, *supra*, 665–666.

Kurth *vs.* The State, *supra*, 134, 137.

As the question is a Federal one the attention of the court is invited to the decision by the Supreme Court in New York State *vs.* Roberts, *supra*.

In that case the last contention for Parke, Davis & Co., the plaintiffs in error, was that the act of New York was unconstitutional and void as in contravention of the Constitution of the United States, and the amendments thereof, it being insisted that taxing all the corporations, joint stock companies, or associations *to*her tha*t* saving banks and institutions for savings, life insurance companies, banks, foreign insurance companies, manufacturing or mining concerns, or companies wholly engaged in carrying on manufacture in mining ores within this State, and agricultural or horticultural societies or associations, denied to the plaintiff in error the equal protection of the laws in subjecting it to a tax from which were exempted other corporations, foreign and domestic, which wholly manufactured the same ciass of goods within the State of New York, and that such a tax is an unjust discrimination against the plaintiff in error.

It is to be noted in passing to the consideration of the opinion of the Supreme Court that, under the Tennessee constitution
205 and the decisions, a corporation, resident or non-resident, would be subject to the tax imposed upon appellee, so that there is no purpose disclosed in the statute of Tennessee, either to discriminate between the New York corporation and those of other States, or between the manufacturers of Tennessee and those of other States, to the detriment of the foreign corporations and manufacturers, or to subject property out of the State to taxation.

The exact question was passed on by the Supreme Court of the United States, Mr. Justice Shiras in doing so in part saying:

"It is said that the operation of that portion of this taxing law which exempts from a business tax corporations wholly engaged in manufacturing within the State of New York is to encourage manufacturing corporations which seek to do business in that State to bring their plants into New York. Such may be the tendency of the legislation, but so long as the privilege is not restricted to New York corporations, it is not perceived that thereby any ground is afforded to justify the intervention of the Federal courts."

In Bell's Gap Railroad *vs.* Pennsylvania, *supra*, 232, the opinion of the Supreme Court was delivered by Mr. Justice Bradley; in part he said:

"The general purpose and scope of the fourteenth amendment, and the general application necessary to be applied to it, are well stated in Barbier *vs.* Connolly, 113 U. S. 2731; Mr. Justice Fields, in delivering the opinion of the court there, said:

"The fourteenth amendment, in declaring that 'no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary depredation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally
206 entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and their property, the prevention and redress of wrongs and the enforcements of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes called the police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of this State, develop its resources and add to its wealth and prosperity."

4. The next contention of the appellee is that the assessment laws of Tennessee, in their applicability to its merchant's capital, violate the commerce clause of the Constitution of the United States. This contention is based upon two propositions:

1. That goods shipped into a State from a foreign country or sister State may not be taxed in any form as long as they remain in the original packages. And—

2. That the goods of the appellee were in commercial transit, and therefore not taxable.

In the order in which we have stated these propositions, we proceed to their examination.

1. The latest utterance of the Supreme Court on the subject is to be found in the decision of May *vs.* New Orleans, decided on May 21, 1900. There May & Co., merchants in New Orleans, were engaged in the business of importing goods from abroad and selling
207 them. In each box or case in which they were brought into this country there would be many packages, each of which was separately marked and wrapped. The importer sold each package separately. The city of New Orleans taxed the goods after they reached the hands of the importer (the duties having been paid) and were ready for sale. The opinion of the court was delivered by Mr.

Justice Harlan. The supreme court of Louisiana held that the tax was valid, and the case was taken to the Supreme Court of the United States by appeal.

Mr. Justice Harlan, in the course of his opinion, said:

"That a State cannot, in the form of a license or otherwise, tax the right of the importer to sell, but when the importer has so acted upon the goods imported that they have become incorporated or mixed with the general mass of property in the State, such goods have then lost their distinctive character as imports, and have become from that time subject to State taxation, not because they are products of other countries, but because they are property within the State in like condition with other property that should contribute in the way of taxation to the support of the go-ernment which protects the owner in his person and estate.

"So the question in the present case is whether the plaintiffs, prior to the assessment complained of, had so acted upon the goods imported by them as to incorporate them with the mass of the property in the State, and bring them, while in their possession, within the range of local taxation.

"We have seen that the plaintiffs, in effect, contend that having paid the duties imposed by the United States they were entitled without liability to taxation upon the goods as property to open the boxes in which the separate parcels of goods were transported, and put such *spearate* parcels in the hands of agents, to be sold wherever in the State or in the country, customers could be found. The *spearate* parcels—such is the effect of the argument—are not to be deemed incorporated into the mass of the property of the
208 State while thus being carried around the country by the importer's agents—no *spearate* parcel, so long as it remained in the particular form in which it was packed in a box or case with other parcels, ceasing to have the character of an import until after it was sold by such agents. This proposition cannot be sustained. We cannot doubt that the goods, when placed in the hands of the agent for sale, in separate parcels, have been so acted upon by the importer that they have ceased to be imports, and have become part of the mass of the State, liable to local taxation. But what is the difference in principle *becase* the case of sales by an importer through travelling agents and the case of an importer who opens the box or case in which his goods, wrapped in separate parcels, were imported, and by employees, sells or offers to sell the separate parcels, either from the opened box or case in his store, or from shelves or counters upon which such articles have been placed for examination and sale?

In our judgment the 'original package' in the present case was the box or case in which the goods imported were shipped, and when the box or case was opened for the sale or delivery of the separate parcels contained in it, each parcel of the goods lost its distinctive character as an import and became properly subject to taxation by the State as other like property situated within its limits. The tax here in question was not in any sense a tax on imports nor a tax

for the privilege of bringing the things imported into the State. It was not a tax upon the plaintiff's goods because they were imported from another country, but because at the time of the assessment they were in the market for sale in separate parcels, and therefore subject to be taxed as like property, in the same condition, that had its origin in this country. We cannot impute to the framers of the Constitution a purpose to make such a discrimination in favor of property imported from other countries
209 as would result if we approved the views pressed upon us by the plaintiffs. When their goods have been so acted upon as to become a part of the general mass of property in the State the plaintiffs stood, with respect to liability to State taxation, upon the same basis of equality as the owners of like property, the product of this country; the only difference being that the importers paid a duty to the United States for the privilege of importing their goods into this country, and selling them in the original packages—a duty imposed for the purpose of raising money to carry on the operations of the Government, and, in many instances, with the intent to protect the industries of this country against foreign competition. A different view is not justified by anything said in Brown *vs.* Maryland. It was there held that the importer by paying duties acquired the right to sell in the original packages the goods imported—the Maryland statute requiring a license from the State before anyone could sell by 'wholesale, bale or package, hogshead, barrel, or tierce,' goods imported from other countries. But it was not held that the right to sell was attended with impunity from all taxation upon the goods as property, after they had ceased to be imports and had become by the act of the importer a part of the general mass of property in the State. The contrary was adjudged.

"Without further reference to authorities, we state our conclusion to be that within the decision in Brown *vs.* Maryland. The boxes, cases or bales in which the plaintiff's goods were shipped were the original packages, and the goods imported by them lost their distinctive character as imports and became a part of the general mass of the property of Louisiana, and subject to local taxation as other property in that State the moment the boxes, cases or bales in which they were shipped reached their destination for use or trade, were opened and the separate packages therein exposed or offered for sale; consequently, the assessment in question was not in violation of the Constitution of the United States."

210 In principle this case cannot be differentiated from Woodruff *vs.* Parham, 8 Wallace, 123. In that case the opinion was given by Mr. Justice Miller; in the course of his opinion he said:

"The merchant of Chicago who buys his goods in New York and sells at wholesale in the original packages may have his millions employed in trade for half a lifetime and escape all State, county and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the State nor the city which protects his life and his property can make

him contribute a dollar to support its government, improve its thoroughfares or educate its children. The merchant in a town in Massachusetts who deals only in wholesale, if he purchases his goods in New York, is exempt from taxation. If his neighbor purchase in Boston, he must *apy* all the taxes which Massachusetts levies with equal justice on the property of all its citizens.

"These cases are merely mentioned as illustrations. But it is obvious that if articles brought from one State into another are exempt from taxation, even under the limited circumstances laid down in the case of Brown *vs.* Maryland, the grossest injustice must prevail, and equality of public burdens in all our large cities is impossible."

The learned judge then reviews all the cases and concludes:

"The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales are made by the citizens of Alabama or of another State, and whether the goods sold are the products of that State or some other."

In Woodruff *vs.* Parham, a tax was levied in Mobile upon all sales of merchandise, and the contention was that the law was invalid, because the tax was laid on the sale of merchandise brought from other States, while remaining in the original packages. On behalf of the plaintiff in error Judge Campbell and Mr. Peter Hamilton urged that the case was controlled by Almia *vs.* California,
211 24 How. 169, and Brown *vs.* Maryland, 12 Wheaton 419, but the Supreme Court held, opinion by Mr. Justice Miller, that the words "imports and exports," as used in the Constitution, had exclusive reference to foreign trade.

The question, since the decision in Woodruff *vs.* Parham, has not been regarded as an open one in the Supreme Court of the United States.

In the case at bar, the property of the appellee is lodged in warehouses, procured for that purpose through an agency to be sure, the agent being a mere bailee, having the custody of the property of the appellee. Consequently the bailor is doing business in Memphis, where a part of its capital is placed, and though it has stipulated for a contractual relation, its power and control over its goods are unrestricted. The business conducted at Memphis is that of delivering from the warehouses goods in fulfillment of contracts of sale, and thereby using the distributing warehouse as an efficient cause of the bailor's profitably marketing its products in Memphis. It may be that it is a mere guise by which it employs some portion of its capital, and the question in reality becomes one of the nature of the agency availed of by the appellee, for the purpose of carrying on its business of marketing its manufactured products in the city of Memphis.

The statute of Tennessee under which the appellee was back-assessed upon its capital in Memphis, was designed to require it and others in like situation with it, without discrimination, to contribute to the revenue of the State, county and city, a tax measured by the average amount of capital employed in doing business in Memphis,

and is but the requirement that is exacted of home corporations, individuals and firms in precisely the same form. Whatever the guise may be, the fact still remains that the appellee is engaged in the business of a merchant in the city of Memphis.

People upon Relation of Badische Fabirk *vs.* Roberts, 152 N. Y. 59–64.

212 In Brown *vs.* Houston, 114 U. S. 622, the Supreme Court, at pages 633–634 said:

"When the assessor of goods goes his rounds, must he omit from his list of taxables all goods that have come into the city from the factories of New England and New Jersey, or from the pastures and grain fields of the West? If he must, what will be left for taxation, and how is — to distinguish between those goods which are taxable and those which are not? With the exception of goods imported from foreign countries, still in the original packages, and goods in transit to some other parts, why may he not assess all property alike that may be found in the city, being there for the purpose of remaining there till used or sold, and constituting part of the great mass of its commercial capital, provided always, that the assessment be a general one, and made without discrimination between the goods, the products of New York, and the goods the products of other States?"

In the subsequent case of The Pittsburg & Southern Coal Co., *vs.* Bates, sheriff, 156 U. S. 539, the opinion of the Supreme Court was delivered by Mr. Justice Field. That case was upon a writ of error to the supreme court of Louisiana, to review a judgment of that court, affirming the judgment of the 17th judicial district court of the parrish of East Baton Rouge, Louisiana. In the course of the opinion, Mr. Justice Field concluded as follows:

"The decision of the court in Brown *vs.* Houston, 114 U. S. 622, thus rendered, seems to be conclusive of the case now before the court. The property in this case, as in that, still belongs to the original owners in Pennsylvania, but is brought on the navigable waters of the United States, in boats and barges, to Louisiana, for the purposes of sale, and is subject to taxation and sale as any other property of the citizens of the United States is subject, when it becomes incorporated into the bulk of the property of the county unless there is some special exemption set forth why it should not be thus taxed and sold, of which there is none here."

213 Mr. Judson in his work on taxation, states the rule that, what constitutes doing business in the State by foreign corporations, is, that a corporation must have a business domicil of some sort in the State, a sales agency, manufacturing plant, distribution warehouse, or an interest in a domestic partnership. It must, in some way, establish a place of business within the State for doing some part of its corporate business.

Judson on Taxation, sec. 181.

This record discloses that the appellee found it desirable to establish, as a distributing point, the city of Memphis, and that in that

city it lodges in warehouses its manufactured products until they are appropriated to its contract of sale. Consequently its property is not only mingled with the great mass of the property in the State of Tennessee, but is in the city of Memphis, at rest, until it is disposed of by selling it. It is not sold when it reaches Memphis, nor even when it is put at rest in the warehouse, but afterward, when each separate part of it is made by use applicable to a specific contract of sale by being *set apart in Memphis and then delivered to* fill an order of sale antecedently taken.

The assessment laws of Tennessee were before the circuit court of the United States for construction, in the case of Oliver-Finnie Grocer Co. *vs.* Speed, 87 Fed. Rep. 408, upon an application for temporary restraining order, until a motion for a preliminary injunction could be heard. In the case it was contended that the tax laws were violative of the commerce clause of the Constitution of the United States. Judge Hammond very thoroughly considered the cases, and concluded as follows:

"In Emert *vs.* Missouri, *supra*, (156 U. S. 296) this construction of the Robbins case is denied, and upon the force of language quoted from that case itself, as follows:

"When goods are sent from one State to another for sale, or in consequence of a sale, they become part of the general prop-
214 erty, and amendable to its laws: Provided that no discrimination be made against them as goods from another State, and that they be not taxed by reason of being brought from another State, but only taxed in the usual way as other goods are."

"Here they are taxed in the remotest way, incidentally, if at all, and not in the least unlike all other goods are taxed belonging to the merchant, nor indeed not unlike all his other taxable property, of whatever kind, for that seems to be the burden of the statute."

(See page 415.)

2. But there the point is made that the goods of the appellee were in commercial transit, and therefore not subject to State tax. If this proposition be well founded in fact, the legal proposition is conceded. The leading case on the subject of commercial transit, is Coe *vs.* Errol, 116 U. S. 517. The plaintiff resided in New Hampshire, owned spruce logs that were drawn down during the winter, from the mountains of New Hampshire to the banks of the stream in the town of Errol, in that State, thence to be floated down the river in the spring, to the State of Maine. The Supreme Court, the opinion being given by Mr. Justice Bradley, affirmed that they were subject to taxation, who in part said:

"Carrying it from the farm or forrest, to the depot, is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it in the course of exportation. It is not part of the exportation itself. Until shipped or started on its final journey out of the State, its exportation is altogether *in fieri*, and not at all a fixed and certain thing."

In Turpin *vs.* Burgess, 117 U. S. 504, at page 507, the Supreme Court said:

"It is true, as was conceded in Coe *vs.* Errol, that the prohibition against laying duties on imports or exports, related to imports from, and exports to, foreign countries. Yet the decision in that
215 case was based on the postulate that when such imports or duties are laid on imports or exports from one State to another, it amounts to a regulation of commerce among the States, and therefore is an invasion of the exclusive power of Congress, so that the analogy between the two cases holds good, and what would be constitutional or unconstitutional in one case would be constitutional or unconstitutional in the other."

The same principle was applied in the case of pine logs cut in Wisconsin, in the case of Nelson Lumber Co. *vs.* The Town of Lorraine 22 Fed. Rep. 454, and in the case of grazing stock in Kelly *vs.* Rhodes, 39 L. R. A. 594.

The question of commercial transit, was elaborately considered in the case of The People upon the relation of The Pennsylvania R. R. *vs.* Knight, 171 N. Y. 354–359. In that *that* case the Pennsylvania R. R. Co. maintained and operated in the city of New York a cab service for the purpose of transporting to various points therein its passengers conveyed to the city by the ferry, from its railroad terminus in an adjoining State, the cab service beginning and ending in the State of New York. The company contended that the capital employed by it in maintaining that service was exempt from taxation imposed by sections 182 and 184 of the tax laws of 1896, relating to franchise taxes upon corporations. This case was elaborately argued, very thoroughly considered, the attorney-general of New York relying upon Coe *vs.* Errol.

U. S. *vs.* A. & P. S. Co. 85 Fed. Rep. 271.
U. S. *vs.* Boyer, 85 Fed. Rep. 435.

The opinion of the court of appeals was given by Cullen, J. In the course of his opinion, quoting from Coe *vs.* Errol, *supra*, 517, he said:

"Whenever a commodity has begun to move as an article of trade, from one State to another, commerce in that commodity between the States has commenced."
216 Citing the Daniel Ball, 10 Wallace 565.

"But this movement does not begin until the articles have been shipped or started for transportation from one State to another. The carrying them in carts or other vehicles or even floating them to the depot where the journey is to commence, is no part of that journey. That is all preliminary work for the purpose of putting the property in a state of preparation and readiness for transportation."

In the recent case of Detroit, etc., R'y Co. *vs.* Interstate Commerce Commission, 43 U. S. App. 308, it was held that the cartage of goods by the R. R. Co. to and from the station for shippers and consignees was not within the interstate commerce act. It is there said:

"We cannot think that under the circumstances, it was the intention of Congress to confuse in our legislation the carting to and from the stations with the transportation on the rails, and if the act can be interpreted to avoid that confusion, it should be done. We may suppose, since with us it is a business done almost exclusively by outsiders and rarely by railroad companies, and being usually done wholly within the territorial limits of a State, is not within the jurisdiction of Congress, that it was not intended to interfere with it except so far as it might affect directly the transportation of goods between the States, by being used -- a device to evade the jurisdiction over that subject."

The judge thereupon stated that the above styled case was affirmed by the Supreme Court in 167 U. S. 633, which expressed its approval of the view of the court below,

"That the railway transportation ends when the goods reach that terminus or station, and are there unshipped, and that anything the company does afterwards, in the way of land transportation, is a new and distinct service, not embraced in the contract for railway carriage." (See pages 359–360.)

217 The principle established by these cases conclusively settles: 1, that the transportation from the point of shipment to Memphis ended when the barges or cars reached Memphis; 2, that the service of the Patterson Transfer Company was not a part of the prior transportation, but a new and distinct service, wholly within the State of Tennessee; 3, that the goods, when lodged in the warehouse, were at rest, their transit having ended; and that, 4, there were two additional services, one that of preparing them for shipment from one State to another, called putting the property in a state of preparation and readiness for transportation, and no part of interstate commerce, and the other service, the shipping or starting for transportation, of the articles from one State to another.

The latest case on the subject of commercial transit is Caldwell *vs.* North Carolina, opinion of the Supreme Court by Mr. Justice Shiras, delivered on the 12th of January last. The point was directly raised. The case was, in short, as follows: An ordinance of the city of Greensboro, N. C., enacted under its charter, ordained that any person engaged in selling or delivering picture frames, pictures, photographs or likenesses of the human face, in the city of Greensboro, whether an order therefor had previously been taken or not, unless that business is carried on by the same person in connection with some other business for which a license had already been paid to the city, should pay license tax of $10 for each year, and that any person engaged in the business without having paid a license tax required of him should be fined $10, and that each and every sale and delivery should constitute a separate and distinct offense.

The plaintiff in error was indicted and fined. The record disclosed that he was employed by the Chicago Portrait Company to deliver certain pictures and frames for which contracts of sale had previously been made by the other employees of that company who

had preceeded the plaintiff in error in Greensboro. The
218 Chicago Portrait Company shipped packages of pictures and frames from Chicago to Greensboro, which the plaintiff received at the Southern Railway station in the latter city, carried to his rooms at the hotel, and there broke the bulk and placed each picture in its proper frame, and from the hotel he delivered, or caused the delivery of pictures, one at a time, to the purchasers, in the city of Greensboro, who had previously ordered them of the former agents of the portrait company.

A special verdict was brought in by the jury, substantially finding the facts as above, and the court adjudged the defendant guilty and fined him $20 and the costs of the action. He sued out a writ of error to the supreme court of North Carolina, where the judgment of the lower court was affirmed by a divided court, Faircloth, C. J., and Clark, J., dissenting.

The case was heard upon a writ of error to that judgment, and the decision of the North Carolina courts was reversed.

It is obvious that the decision in nowise affestes the principle in this case, for there was a continuing transit from shipment to delivery, and the property was never at rest for a moment, whereas here the manufactured products of the appellee were sent to Memphis, not in appropriation to contracts of sale to be delivered to vendees by the agent of the company, and for purposes of separating the bulk into parcels, so that there might be specific deliveries to specific vendees, but to be warehouses *en masse*—that is, placed in distributing warehouses and thereafter to be dealt with as directed by the appellee. In some instances the record disclosed that persons desiring to purchase the products of appellee, so warehoused in Memphis, went to the agent of the Patterson Tr*n*asfer Company and he delivered them what they desired to purchase, sending a check to cover the purchase to Chicago; but in the general course of business the deliveries were made out of the mass of the property warehoused and insured in the distributing warehouses, through orders
219 that were received from Chicago, directing to whom and to what points shipments should be made.

Neither can the appellee derive any comfort from the decision of the Supreme Court in the case of Rhodes *vs.* Iowa, 170 U. S. 412. The opinion of the court in that case was given by Mr. Justice White, and the dissenting opinion by Mr. Justice Gray. The opinion of the court deals with the question as follows:

"The sole question presented for consideration is whether the statute of the State of Iowa can be held to apply to the box in question whilst it was in transit from its point of shipment, Dallas, Ill., to its delivery to the consignee at the point to which it was consigned. That is to say*s*, whether the law of the State of Iowa can be made to apply to a shipment before the arrival and delivery of the merchandise without causing the law of Iowa to be repugnant to the Constitution of the United States." (See page 414.)

In the course of the opinion, Mr. Justice White said:

"The fundamental right which the decision in the Bowman case

held to be protected from the operation of State law by the Constitution of the United States, was the continuity of the shipment of goods coming from one State into another, from the point of transmission to the point of consignment, and the accomplishment there of the delivery by the transfer covered by the contract." (Page 419.)

That fundamental right we concede to its fullest extent, but we affirm that from the points of transmission to the point of consignment, the delivery was accomplished in every instance when the manufactured articles of appellee reached the city of Memphis, and were put at rest, and that in no instance has the Supreme Court of the United States otherwise held.

We submit that we are entitled to a decree reversing the decree of the court below.

The substance of the contractual arrangement which was entered into between the Patterson Transfer Company and the appellee in 1900 was to enable that company to ship from its manufacturing plants its products, to its own order, to Memphis, there to be stored by the Patterson Transfer Company in three warehouses which it provided for the purpose. These goods were universally shipped by the American Steel & Wire Company to its own order, the usual method of shipment being by barges which were towed down the Mississippi river to Memphis, and, on arrival at Memphis, they were hauled by the Patterson Transfer Company in its wagons to the warehouses it had previously rented, and there sorted out. (Record, pages 74, 77, 79.)

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This assortment by the employees of the Patterson Transfer Company consisted in separating the different goods, putting the nails of one character to themselves, all the wire of one character to itself, the purpose being to have the goods so arranged that when the delivery to fill a sales order from this bulk of goods was ordered to be made, the goods could be readily separated and appropriated to the order.

We wish to invite the attention of the court again to the uncontroverted fact that these goods were no longer in transit; that they had reached their ultimate destination, and though stored in the warehouses of the Patterson Transfer Company, they were the goods of the appellee always, and that the appellee exercised not only absolute dominion and control over them, but that the Patterson Transfer Company was a mere servant and agent of the company to carry out its direction. Not an article of these goods was to be appropriated to a contract of sale prior to its being dealt with by the Patterson Transfer Company as the agent and servant of the appellee. When dealt with it was invariably by direction, which amounted to its sale in Memphis, as will appear on the record, page 103, where a form appears, universally used to order goods supplied.

In the Memphis territory, including the city of Memphis, and also in the adjacent territory of Texas, Arkansas, Alabama, Mississippi and Georgia, the soliciting sales agents of the appellee solicit orders for nails and wire from different job-

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bers or merchants. Getting the order, as heretofore stated, it would be sent to Chicago, and then the manager in Chicago would write the Patterson Transfer Company to appropriate of the goods in the warehouse a sufficient quantity to fill the order, and if such merchant or jobber lived in Memphis, the delivery would be made by the wagons of the Patterson Transfer Company to the place of business of the Memphis merchant. If he did not live in Memphis, the goods would be shipped as the goods of the American Steel & Wire Company to the jobber under a direction, a specimen of which appears on the record, page 103.

(See Record 79–81–94.)

While this was the usual course of dealing, in very many cases the merchant desiring a carload of nails would go to the Patterson Transfer Company and ask for the delivery to him on the next day of such carloads as he needed. Then an order would be telegraphed to Chicago by the Patterson Transfer Company, and an order would come back from Chicago to the Patterson Transfer Company to make delivery, and the goods would be delivered the next morning, or the day after, the merchant remitting the price thereof directly to the Chicago manufactory. (Record 96–97–109–110–113.)

Now and then, when the Memphis merchant wanted the goods of the appellee, that merchant would write an order and give specifications, and either mail it to the Patterson Transfer Company or give it to a boy to deliver. It would be addressed to the American Steel & Wire Company, and asking that it be delivered as soon as possible, and very frequently it was the case that the goods were already in Memphis that were applicable to the contract, and then the merchant sometimes made out his specifications one day, and the goods were delivered the next day. (Record, page 116).

Upon this testimony, the appellee's contention that the State of Tennessee has no right to impose any tax, because that would
222 be an interference with interstate commerce, seems to us conclusive- otherwise determined in Brown *vs.* Houston, and the authorities heretofore cited.

The fact- in the above case were, briefly: Brown and another mining and owning a lot of coal in their own barges, shipped the same to New Orleans, in the State of Louisiana. At that city they broke up the different barges or coal which arrived there as the property of Brown & Jones. Some of the coal which thus arrived was shipped from New Orleans to other points. It was insisted on behalf of Brown & Jones, first, that their coal was in transit, and second, that it had never intermingled with the general property of the State of Louisiana; but the Supreme Court of the United States by unanimous decision held otherwise. Mr. Justice Bradley in part said:

"As to the character and mode of the assessment, little need be added to what has already been said. It was not a tax imposed upon the coal as a foreign product, or as the product of another State than Louisiana, nor a tax imposed by reason of the coal being

imported or brought into Louisiana, nor a tax imposed by whilst it was in a state of transit through that State to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become a part of the general mass of the property in the State, and as such it was taxed for the current year (1880), as all other property in the city of New Orleans was taxed. Under the law it could not be taxed again until the following year. It was subjected to no discrimination in favor of goods which were the product of the State of Louisiana, or goods which were the property of citizens of Louisiana. It was treated in exactly the same manner as such goods were treated."

Brown *vs.* Houston, 114 U. S. 633.

223 Brown & Jones were succeeded by the Pittsburg Coal Company, and that company, endeavoring to avoid local taxation, shipped a lot of coal again to Louisiana, and, believing that local taxation might be avoided, it temporarily moored its barges containing such coal opposite Baton Rouge, Louisiana. The coal had not reached its final destination, was not about to be sold or broken up, and the corporation believed that—as the individuals who had owned it believed—it might escape taxation on the ground that the goods had not been intermingled with the general taxable property of the State of Louisiana. But the Supreme Court of the United States, in the *the* Pittsburg Coal Company *vs.* Bates, 156 U. S. 589, held that such coal had become a part of the taxable property of the State of Louisiana, and was liable—because no discrimination had been made—for such taxes as were levied generally by the State of Louisiana upon personal property in such State.

Perhaps the clearest statement which has been made of the principle governing taxation of this character is found at pages 318 and 319 of 156 U. S. in Emert *vs.* Missouri. The Supreme Court of the United States through Mr. Justice Gray by unanimous decision used the following language:

"When goods are sent from one State to another for sale, or in consequence of a sale, the become a part of its general property and amenable to its laws; provided that no discrimination be made against them as goods from another State, and that they be not taxed by reason of being brought from another State, but only taxed in the usual way as other goods are."

In seeking to hold the American Steel & Wire Company for this tax, we insist that no discrimination between it and other citizens of Tennessee is asked. The American Steel & Wire Company has goods in this State which have come to their final destination for use or sale. They have become intermingled with the generl property of Tennessee. No effort has been made to tax them dif-

224 ferently from the goods of other merchants situated in Tennessee, or from the goods of other merchants living or following business in Tennessee.

Kegs of nails and rolls of wire are placed upon exactly the same footing as packages of dry goods or barrels of flour. These goods are here. They belong to the American Steel & Wire Company. Some of them have only remained here for a few days, as in the language of the Supreme Court of the United States, or they may have been here for several years. At least they are here. No tax has been imposed upon them for having been brought here. They are a part of the property situated in Tennessee. No discrimination has, therefore, been shown by the county court clerk in taxing them as goods brought from some other point.

All wholesale merchants in Tennessee receive packages in the original shape that they are made up when sent from the factory. All wholesale merchants in Tennessee sell to merchants elsewhere or in Tennessee, precisely the same packages that they have received from the factories; but while such goods are in Tennessee they form a part of the capital stock of such merchants, and are taxable under our revenue laws, just as well as other stocks of goods — taxable.

May we be allowed to say that goods are scarcely in transit which have reached their final destination?

In Brown *vs.* Houston, in the Pittsburg Coal Company *vs.* Louisiana, in every other case where the question has been fairly presented, the test of the whole matter lies in the fact of whether the goods had arrived from the point at whence they were shipped to the point to which they were shipped, and were there assorted and broken up.

It is not open to controversy that these kegs of nails and bundles of wire had their starting point at Pittsburg or at some factory, and a landing point at Memphis. They were assorted at Memphis, and while some of them might begin another journey, the original point of destination was Memphis, Tennessee; were stored in a warehouse, assorted in a warehouse and sold from a warehouse. They had become intermingled with the property in Tennessee and were, like the goods of any other dealer, subject to the taxes in Tennessee.

As to that line of cases where an original package brought, we will say, from Indiana to Tennessee, and which, it has been held, is not subject to a tax, we wish to reply that this line of cases only relates to a sale made of goods not at rest to be distributed in Tennessee, and which is shipped directly to the customer.

In this case, while it is claimed that many of the kegs of nails and bundles of wire were sold before such goods reached Tennessee, it will not be claimed that they were shipped directly to the purchasers in Tennessee, or were not at all times at the warehouses in Tennessee to be applied to orders of sales. The goods, therefore, came here the property of the American Steel & Wire Company, remained here the property of the American Steel & Wire Company, and were either sold as the property of the American Steel & Wire Company or were shipped from here as the property of the American Steel &

Wire Company, and therefore were intermingled with and became a part of taxable property in the State of Tennessee.

Both in Brown *vs.* Houston and The Pittsburg Coal Company *vs.* Bates, it appears that the coal sought to be taxed in Louisiana haf already paid a State tax in Pennsylvania. In the American Steel & Wire Company case, that corporation does not appear from this record, to have paid any tax anywhere upon the goods that it ships to Memphis, and sells from Memphis. Indeed it appears from Mr. Merriman's deposition that excepting some tax paid in Chicago as a broker, nothing whatever has ever been paid by this corporation on the goods that it asks the privilege of selling from the warehouses here in Memphis, without paying any tax at all upon them, although the record shows that all sales orders were filled in Tennessee.

JAMES M. GREER AND
WM. H. CARROLL,
Counsel for Appellant.

226 In the Supreme Court of Tennessee, at Jackson, April Term, 1903.

AMERICAN STEEL & WIRE CO., Appellee,
vs.
R. A. SPEED, Appellant.

Supplemental Brief on Behalf of Appellee.

Patterson, Neely & Henderson, attorneys for appellee.

Filed May 4, 1903.
JNO. W. BUFORD, *Clk.*

227 In the Supreme Court of Tennessee, April Term, 1903.

AMERICAN STEEL & WIRE CO., Appellee,
vs.
R. A. SPEED, Appellant.

Supplemental Brief on Behalf of Appellee.

As the brief of Col. Wm. H. Carroll and Judge Jas. M. Greer, of counsel for appellant, was not see- by counsel for appellee until after the argument, we file this as a supplement to our brief now with the court.

The position taken by learned counsel to the effect that some tax was due from appellee, and if it was compelled to erroneously pay a merchant's tax, it could now hold the money so received, notwithstanding it was not liable for a merchant's tax, because it ought to

pay a property tax, or some tax, is untenable. If appellee really owed a tax, say, of $500, which was irregularly collected, we concede that, having paid the tax, it could not sue and recover the money so paid on account of the irregularity; but a court of equity would permit the State to retain the money which actually belonged to it, under such circumstances. But here there is no irregularity. If any tax is due at all, it is a property tax, whereas the tax collected is a privilege tax. Both the amount of assessment and the manner of collection is different. In one case the clerk of the county court makes the assessment and collection, and in the other the county trustee. In one case the lowest amount of the merchant's stock and the highest amount of the merchant's stock for the year are added together, and the sum divided by two, and in this way the
228 amount to be taxed is arrived at. This is the way in which the merchant is taxed; but a manufacturer is taxed on the cash value of the property which he actually owns, and has subject to taxation on the 10th day of January of the tax year. So it is impossible for the two taxes to be the same.

It is absurd to hold that an officer can assess an illegal tax, and collect an illegal tax, and the State has the right to hold it, because another officer has a right to assess and collect another tax of a different kind and amount.

We will not further discuss the jurisdiction of the State board of equalizers, because, in view of the deliverances of this court, cited in our brief, it is very clear that the board has no jurisdiction except to equalize values, and we submit that it is absurd to say that because the board of equalizers hold that a manufacturer is a merchant, that the courts are pretermitted in holding to the contrary. Learned counsel rely on the case of Kurth *vs.* The State (2 Pickle 134). We submit this case has no application to the case under discussion. The law provided in that case, it seems, that "persons selling liquors in quantities of a quart or more, except manufacturers, who sell to be sold again, are wholesale dealers, and persons selling in smaller quantities than a quart are retail dealers."

Now, the court simply held that where wine was manufactured and the manufacturer sold it in less quantities than a quart, that, under this statute, he was a retail dealer, because he fell exactly within its definition, and that section 30 of the constitution of the State did not protect him in selling the wine so manufactured, on the ground that it was not subject to taxation, except for inspection fees. We do not criticise the soundness of this case, but insist that it has no application.

If the General Assembly of the State had passed an act defining a manufacturer who sells his manufactured products to be a merchant, then we would concede, that under the authority of
229 the case referred to, appellee, if liable at all, would be liable to pay a merchant's tax. The statute in that case defines a retail liquor dealer to be one who sells liquor in less quantities than a quart, and the defendant in that case fell precisely within that category.

In this case we have no statute saying that a manufacturer becomes a merchant because he sells his manufactured products. On the contrary, the statute expressly defines a merchant to be "one who is engaged in trading or dealing in any kind of goods, wares, merchandise, etc."

Unless learned counsel can convince the court that one who sells his produce is a dealer or trader in that produce, he must necessarily fail in his contention. The question arises, who is a trader, and who is a dealer? The Standard dictionary defines the word "deal" to mean "to have business relations, mutual intercourse, or deal with a person, or to be interested in the buying, and selling of something." "Trading" is defined to mean, "carrying on trade." The verb "trade" means to engage in commerce or business transactions, of bargin and sale. The noun "trade" is defined as "buying and selling for gain or as a means of livelihood, mercantile traffic, commerce."

It is impossible to conceive how a manufacturer becomes a merchant, or can, in any proper sense, be called a dealer or t-ader because he sells his manufactured products. If the contention of learned counsel is good, then a manufacturer causes to be a manufacturer when his products are finished, and the moment he sells his product he becomes a merchant. By the same logic a farmer, until he plants and gathers his crop, is a husbandman; but as soon as he offers for sale, or sells the product of his farm, he becomes a merchant. A cotton manufacturer can go out and buy cotton, spin it into thread and weave it into cloth; but as soon as the product is finished he becomes a merchant, if he sells that product.

A manufacturer of lumber may buy timber, saw it up into lumber, and up to this point he is a manufacturer of lumber; but as
230 soon as he offers his lumber for sale, he ceases to be a manufacturer and becomes a merchant. The American Steel & Wire Company, a corporation engaged — the manufacturer of nails, staples, barbed and smooth wire, is a manufacturer when it buys its material and up to the point when it is converted into the finished product; but when it sells the finished product it ceases to be a manufacturer and becomes a merchant.

Section 23 of the assessment laws of 1901, provides: "That all persons, corporations or joint stock companies, engaged in the manufacture of any goods, wares, merchandise, or any article of value, shall pay an ad valorem tax upon the actual cash value of their property, real, personal or mixed, which is used or held for the purpose of manufacturing, preparing and completing and finishing goods, wares and merchandise, and the articles in the manufacture of which the parties aforesaid shall be engaged."

A foreign corporation, under section 24 of the assessment laws, is only required to pay taxes "on the actual cash rates of the corporate property in this State."

It will be observed that the law expressly provides not only for the taxation of the plant, and all raw material not converted into the finished article, but to tax the articles in the manufacture of

which the corporation is engaged. Consequently, if the contention of learned counsel be sound, appellee could be taxed as a merchant, and also be compelled to pay this property tax on its manufactured products. The argument in this respect is thus reduced to an absur-ity.

Learned counsel, in the argument, failed to comprehend the position of appellee, in respect to the contention that if the article were manufactured out of the produce of Tennessee, they could not be taxed, and therefore, to tax the articles manufactured by appellee out of the produce of other States, would be a discriminating tax.

If an attempt had been made not to levy a merchant's tax
231 on appellee, but a property tax, then this point would be well taken, and all that counsel for appellee said, or intended to say, was that if the contention of appellant be sound, and appellee is, in point of fact, a merchant, and the merchant's tax was properly assessed, then this constitutional question would not arise because it could only arise when the goods were in hands of a manufacturer, and not in the hands of a merchant. To illustrate:

In the recent unreported case, in which Judge Wilkes delivered the opinion of the court, it was decided by this court that the lumber made by a manufacturer out of logs cut from Tennessee soil, was not subject to a tax under the constitution of Tennessee, which provides that articles manufactured out of the produce of this State shall not be taxed while they are in the hands of the manufacturer. Now, if it be true, as contended by learned counsel, that as soon as the finished product is offered for sale by the manufacturer he becomes a merchant, then the manufacturer would not be protected at all under the constitutional exemption, but his products, the moment he offers them for sale, would be subject to a merchant's tax.

Learned counsel particularly relied in his brief and argument on the case of State *vs.* Roberts (171 U. S. 658). We submit that this case has no application to the question under discussion. The statute of New York provided that "every corporation, joint stock company, or association, whether now or hereafter incorporated, organized or formed, under, by, or pursuant to law in this State, or in any other State or country, and doing business in this State, * * * shall be liable to, and shall pay a tax upon its franchise or business into the State treasury, annually, to be computed as follows:" and that "the amount of capital stock,—shall be the basis for taxation in the case of every corporation, joint stock company and association liable to taxation thereunder, shall be the amount of capital stock employed within the State." This statute was held not to be

repugnant to the Constitution of the United States.

232 In that case the Supreme Court held to the familiar doctrine that "a State may impose such conditions upon permitting a foreign corporation to do business within the State as it may judge expedient, and that it may make the grant or privilege dependent upon the payment of the specific license tax, or a sum proportionate to its capital used within the State."

Now, if Tennessee should pass a law, providing that all domestic

and foreign corporations in Tennessee engaged in manufacturing should be liable to a merchant's tax on the average amount of their manufactured products sold in this State, the average to be arrived at by taking the smallest amount on hand and the largest amount on hand during the tax year, and dividing it by two, and that every such corporation, domestic and foreign, should in this way be taxed as merchants, then, if that statute was brought in question, the case referred to would be applicable, and we have no doubt the Supreme Court of the United States would, in such a case, hold that, as the law was general and applicable alike to domestic and foreign corporations, it would not be repugnant to the Constitution of the United States.

Now, the tax imposed on all corporations, domestic and foreign, under the New York statute, was not on the property of the corporation but on its franchise or business. It was, in other words, a privilege, and not a property tax, and so, in this State, if a law was enacted providing that all manufacturers, domestic and foreign, doing business in this State, should pay a privilege tax, it would not be obnoxious either to the State or Federal Constitution and so, if a general law was passed providing that all domestic and foreign corporations engaged in manufacturing in this State, should pay a franchise tax, or a privilege tax, for doing business in this State, such a law would not, we concede, be subject to constitutional criticism.

It is true, in the Roberts case, referred to, that the goods
233 sold were in the original packages, but a larger proportion of the goods were goods not manufactured by the corporation at all, but importation, and the question of taxing goods in the original packages did not arise at all in the case, because the tax was a franchise or privilege tax, and not a property tax. And just so in this case; we concede for the purpose of argument, that if all domestic and foreign manufacturers, whether corporate or individual, doing business in this State were required to pay a merchant's tax or a privilege tax on the business of such manufactures, the American Steel & Wire Company could not complain; but there is not a domestic manufacturer in Tennessee who pays a privilege tax, or, in other words, a merchant's tax. There is not a domestic corporation engaged in manufacturing in Tennessee that pays a franchise tax, much less a merchant's tax. We will venture the assertion that this is the only instance in the history of the State where an attempt was made to tax a manufacturer as a merchant, because he sold his manufactured products. So we confidently insist, that, if we are liable to pay a tax at all, it is a property tax, and not a merchant's tax, and that the holding of the learned chancellor in this case is absolutely free from doubt or criticism.

We insist that learned counsel have not fairly stated the case in their brief. We especially object to the declaration on page 7 of the brief to the effect that appellee, in forwarding its goods to Memphis to be assorted and distributed at that point, did so as a "device" to evade the tax, or that it is, in any sense, a "sham." The truth

about the matter is that it is not only fair and above board, but the citizens of Memphis interested in the Patterson Transfer Company, who brought the arrangement about, are absolutely incapable of any "device" or "sham" under any pretext whatever. It is a singular fact that learned counsel have not even referred in their brief to the case of Leisy *vs.* Hardin, or the case of Lyng *vs.* The State.

In the argument, Col. Carroll ingeniously insisted that the case of Leisy *vs.* Hardin could be differentiated from the case under
234 discussion, because, in the case of Leisy *vs.* Hardin, the packages of beer were sent to Keokuk, and sold in the original packages, notwithstanding a law in Iowa prohibiting the same of beer in that State. So, he insisted that that was a case in which Iowa attempted to exercise a police power for the exclusion of the beer, and that could not be done as long as the beer was in the original packages, and it could be sold to the citizens of Iowa in the original packages. We submit that it is impossible to draw a distinction between a law prohibiting the sale of an article, and a law taxing an article, insofar as the commerce clause of the Constitution of the United States applies to the transaction. The power to tax means the power to destroy. If Iowa could have taxed the original packages, it could have placed such a tax upon them as to have prohibited their importation into the State, and the tax would have been just as effective as a prohibitory law. Nowhere in any of the decisions can learned counsel find a case that differentiates the exercise of the taxing power from the exercise of the police power.

The case of Lyng *vs.* The State, following immediately the case of Leisy *vs.* Hardin, expressly holds that a tax upon the original packages is unconstitutional and void. Learned counsel say that this was a discr-minating tax. We deny that the court based its decision upon any such ground, and invite a perusal of the case. It was based upon the broad ground that as long as the goods remained in the original packages, they could not be taxed in the one case, or prohibited in the other.

The contention of learned counsel that because the tax is uniform, and applies to all the property in the State as well as to property imported from another State, and, therefore, it is not obnoxious to the Constitution of the United States, cannot be maintained.

In the case of Robbins *vs.* The State, cited in our brief, it was expressly held that, notwithstanding the same tax was imposed
235 upon the foreign drummer — was imposed upon the domestic drummer, did not operate to make the tax upon the foreign drummer constitutional; but the court held that the tax upon the drummer was a tax upon the property of his foreign employer and obnoxious to article 1, section 8, of the Federal Constitution.

Learned counsel seem to rely on the case of May *vs.* New Orleans (178 U. S. 466). We fail to see the application of this case. The court simply held, as many other courts have held, that where a number of packages were enclosed in one larger package, that the larger package was the package of commerce, and not the smaller

packages within the large casing. The court expressly held that, as to the la-ger package, it was protected by article 1, section 8, of the Federal Constitution, and the importer could have sold the goods in the larger package without being subject to a tax; but the moment he broke the larger package open and sold the goods taken from the larger package, they became commingled with the goods of the State, and were no longer the original packages of commerce.

In the case we now have under discussion, there is no pret-nse that the kegs of nails and staples, the reels of barbed wire, and the coils of smooth wire, were not the original packages of commerce—the packages made up at the manufactories, and in that form shipped at the initial point of transportation.

Under the definition of original package, laid down by this court, there can be no doubt whatever on this subject.

Learned counsel in his argument relied especially on the cases of Brown *vs.* Houston, and Pittsburg and Southern Coal Company *vs.* Bates, cited in our brief. As stated in our original brief, these cases can easily be differentiated from the case under discussion. In the first place, the coal went to New Orleans to there be sold, whereas, the products of the American Steel & Wire Company, before they came to Memphis, had been sold, and were here only for assortment, distribution and delivery. In the second place, these cases
236 are very simila- to the case of May & Co. *vs.* New Orleans. In that case, where the large casing containing the smaller packages was broken open, and the smaller packages were offered for sale, the court held that the larger casing was the package of commerce, and when broken open, notwithstanding the contents were made up in smaller packages, became commingled with the property of the State, and was subject to taxation.

Now, if the American Steel & Wire Company had purchased barges, loaded them with kegs of nails and staples, and reels of barbed and smooth wire, and then had sent those barges down the Mississippi river sealed, and with the contents ma-ked upon the barges, then we are willing to concede that the barges, in that case belonging to the appellee, were the original packages of commerce, and, when broken open, the smaller packages contained in the barges would become commingled with the property of the State and be subject to taxation.

In that case the principle would apply where small packages of cigarettes were enclosed in a larger package, the larger package would be the package of commerce, and the smaller packages, taken from the larger, would not be.

In the case of Brown *vs.* Houston, and Pittsburg and Southern Coal Company *vs.* Bates, the barges belonged to the coal company, and the coal was being sold out of the barges to the purchasers—the barges remaining the property of the coal company. If the barges had been loaded with coal, and the amount of coal in each barge marked upon it, and the barges containing the coal had been offered for sale instead of the coal out of the barges, then we concede that the barges would be the packages of commerce, and

would be protected; but whenever the packages were broken, and the coal was being sold from the barges to the customers, it was no longer protected.

237 Now, there are many cases, for instance, the case in Alabama, where bottles of whiskey were shipped—each bottle to itself—then each bottle would be the package of commerce; but if all the bottles were placed by the shipper in one box or crate, the box or crate would be the package of commerce, and not the separate bottles. So, in this case, every reel of barbed wire, and every coil of smooth wire, and every keg of nails and staples came separately, each was shipped separately—without any other casing around it—delivered to the common carriers by the appellee, and brought by the common carriers to Memphis in that shape. We submit that a clearer case was never made out in any case presented by the books.

Were the Goods in Transitu?

On this question we can add but little to our general brief. We earnestly invite the attention of the court to the testimony in the case. When it is read and carefully considered, we think the court will come irresistibly to the conclusion that the goods were never sent to Memphis for sale; that they are not sold in Memphis; but they are forwarded to Memphis to be there assorted, distributed, and delivered to the jobbers who have purchased them.

In this connection we have caused to be copied the opinion of the court in the case of The State *vs.* Carrigan (N. J. Law Reps., 10 Vroom, 35), and also the opinion of the court in the case of State *vs.* Engle (5 Vroom, p. 425).

The case of The State *vs.* Carrigan answers the inquiry made by Justice Neal during the progress of the argument. In this case about 2½ per cent. of all the goods shipped to Memphis for assortment, distribution and reshipment, without specifications, were sold by the American Steel & Wire Company to Memphis jobbers, and so in the case of The State *vs.* Carrigan, a small amount of the coal was sold to the citizens of Port Johnson, and yet the court

238 held that "those transactions were described as exceptions, and are shown to be so by the small amount of the sales in this way as compared with the entire business of the company.

We submit that these cases are directly in point, and are practically identical with the case now under discussion.

PATTERSON, NEELY AND HENDERSON,
Attorneys for Appellee.

239 In the Supreme Court of Tennessee.

AMERICAN STEEL & WIRE Co., Appellee, vs. R. A. SPEED, Clerk, Appellant. } No. 31. Equity Cause, Shelby Co.

Additional Brief and Argument on Behalf of Appellant.

By Charles T. Cates, Jr., attorney general.

Filed May 4, 1903.
JNO. W. BUFORD, *Clk.*

240 In the Supreme Court of Tennessee.

AMERICAN STEEL & WIRE Co., Appellee, vs. R. A. SPEED, Clerk, Appellant. } No. 31. Equity Cause, Shelby Co.

May it please your honors:

The question before this court for its determination is whether the appellee, American Steel & Wire Company, hath the right to recover from the State of Tennessee, through the appellant R. A. Speed, clerk of the county court of Shelby county, certain taxes assessed against appellee and paid by it under protest.

Statement of Case.

The American Steel & Wire Company was back assessed as a "merchant" by the county court clerk of Shelby county, after due and legal notice, upon its "capital" or "average amount of stock on hand" for the year ending February 1, 1901, at $72,326, for the year ending February 1, 1902, at $166,275 and between February 1, 1902, and August 1, 1902, at $196,362. There seems to have been no complaint made with respect to the amount of the assessment, but the American Steel & Wire Company appealed to the State board of equalizers, contending that it was not liable to be taxed because:

1st. It was not a merchant and therefore not liable to be so assessed upon its property or "capital."

241 2nd. That the "capital" or "stock," upon which the assessment was made, consisted alone of goods *in transitu* from one State to another and therefore that the tax levied upon said stock was an interference with commerce between the States.

3rd. That the property sought to be assessed would be exempt from taxation if produced or manufactured in Tennessee, and there-

fore the tax levied would be a discriminatory tax and, for this reason, in violation of the commerce clause of the Federal Constitution.

A large amount of proof was taken and a full hearing had before the State board of equalizers who, in all respects, affirmed the assessment as made by the clerk and ordered him to proceed to collect the tax.

Rec. pp. 130, 133.

Thereupon the tax was paid under protest and this suit was instituted in the chancery court of Shelby county for its recovery, where, after answer and proof, the chancellor held and decreed that the American Steel & Wire Company was not liable for the tax and directed its repayment.

The clerk prayed and was granted an appeal.

Rec. pp. 138, 140.

Brief and Argument.

While we insist that the action of the State board of equalizers is conclusive upon every question of fact involved in the assessment, we deem it proper to here set out a brief statement of the more salient facts found in the record:

The appellee, American Steel & Wire Company is a foreign corporation, chartered under the laws of New Jersey, and is the
242 owner of a number of mills or factories in the States of Pennsylvania, Illinois, Indiana, Ohio and Massachusetts, wherein are made nails, staples, barbed and smooth wire and other articles of wide and general use; it is also the owner of "several other lines of business, transportation and steamships."

Rec. p. 28.

In the early part of 1900, appellee determined to establish a branch of its business at Memphis for the purpose of reaching and controlling the trade of the southwest in the articles manufactured by it and for that purpose began to ship immense quantities of its goods to itself at Memphis, where the same were taken in charge by the Patterson Transfer Company and stored in warehouses and there assorted. The nails and staples were shipped in kegs, the barbed wire on reels and the smooth wire in coils or bundles, and in this form they were stored and remained until sold. Because water transportation was cheaper than by rail, the bulk of the goods was carried in barges to Memphis. Unloading, transferring to the warehouse and the storage of each keg or spool was regarded as a distinct and separate service by the Patterson Transfer Company and as such was paid for by appellee.

Rec. p. 92.

All of these goods stored by appellee in its warehouses were insured by it in its own name.

Rec. p. 112.

It is contended by appellee that these goods were assembled at Memphis for the purpose of more conveniently filling "orders" or "contracts" for its goods given by its customers to its traveling salesmen in Tennessee and throughout the Southwestern States, and that with respect to its customers in Memphis its sales, being of nails or staples in the original keg and wire on the original reel or spool, were of goods from another State in the original packages and in consequence of a previous order, and that as to its
243 customers outside of Memphis, who are supplied from these warehouses in Memphis, its goods are *in transitu* from the time they leave the factory until delivered to the purchaser and therefore it is insisted by appellee that it is not engaged in carrying on the business of a "merchant" in Tennessee and its goods are not liable for taxes in or to the State.

To this, the State replies that appellee in every material respect has been carrying on the business of a "merchant" in this State and that the goods stored by it in the warehouses in Memphis are either brought there to be sold or placed there at rest in consequence of a sale, whereby they have become a part of the general mass of property in the State and as such amenable to its laws. The claim that the goods shipped by appellee to itself at Memphis are to meet or fill "orders" or "contracts" obtained from its customers in advance of manufacture is not supported by the proof.

The extent of the obligation imposed by this "order" or "contract" obtained from its customers in advance is not very clear from this record, but it is manifest from the testimony of Mr. Merriman, assistant general sales agent of appellee, that it is largely optional with the customer as to the amount and kind of goods he will take, because until he sends in his "specifications," the appellee does not know what kind or the amount of goods will be taken by the customer and until the same are delivered from the warehouse to the customer, they remain the property of appellee; and it must be borne in mind that all of these "specifications" are filled out of the unmarked and general mass of property in the warehouse.

In proof of this proposition, we call your honors' attention to a part of Merriman's testimony, as follows:

"Q. But when the goods are actually shipped, they have frequently not been sold; isn't that a fact?

"A. I would not like to say it has frequently been the case.
244 Q. Then it has been the case; I will change my question?

A. Well, it might have been; there have been some few tons of stuff on way here that had not been sold; I would not like to say positively; because I have already explained these contracts here are not specified until the man wants the goods; therefore we can not say just exactly what he is going to take.

Q. Who owns the goods shipped by you to Memphis to be delivered to yourselves?

A. The American Steel & Wire Company.

Q. And when they reach Memphis they belong to your company, the American Steel & Wire Company?

A. That is right.

Q. They only become the property of your customers who buy them when they are delivered to your customers; is that not correct?

A. Yes, that is true."

Rec. pp. 43, 44.

So the fact is that the goods are not actually sold by appellee or purchased by the customer until the "specifications" are sent to the warehouse and filled out of the general mass therein stored.

Moreover, to further demonstrate the fallacy of appelle-'s contention, it is only needful to point out to your honors that at any time any of the customers of appellee could secure goods from these warehouses and have immediate delivery out of that unmarked mass of property, by sending to the warehouse a written "specification" or "requisition" for the amount and kind of goods needed or desired.

Rec. pp. 118, 119, 120, 123, 61.

Upon these facts, what is the law?

Appellee Was Properly Assessed as a Merchant.

In support of this proposition we submit:

1st. That the method adopted by appellee in carrying on
245 its business and dealing with its goods brings it within the meaning of the term "merchant" as defined by our assessment acts.

"The term 'merchants,' as used in this act, includes all persons, copartnerships, or corporations engaged in trading or dealing in any kind of goods, wares or merchandise * * * whether such goods, wares or merchandise be kept on hand for sale, or the same be purchased and delivered for profit, as ordered."

Acts of 1901, ch. 174, sec. 27.

In holding that appellee was not a merchant, the learned chancellor evidently restricted himself to the meaning of that term as understood at common law and cited approvingly in the case of State vs. Smith.

5 Hump. 394, as follows:

"It seems the business of buying and selling should be the pursuit and vocation of a party, by which he makes his living, in order that he shall be regarded as a merchant."

It must be borne in mind that in the Smith case the court was considering a statute which used the term "merchant" without attempting to define it, and, therefore, was restricted to the definition which custom and usage had given to the word. But the legislature acting within its just authority, has seen fit to declare that all persons or corporations engaged in trade or dealing in any kind of goods and whether the same be kept on hand for sale or be purchased and delivered for a profit, are to be taxed as merchants.

It is evident that the General Assembly by this definition, first incorporated in the assessment statutes many years ago, intended to broaden the meaning of the term "merchant" so as to meet the exigencies of our expanding commerce and the diverse and varying nature of our trade.

Under the old definition of the term, a manufacturer selling the goods made in his own factory could not be taxed as a mer-
246 chant because he had not bought to sell and this contention was urged upon this court in the Kurth case, but this court held otherwise, sustaining the construction here contended for by appellant.

Kurth *vs.* State, 86 Tenn., 134.

2nd. But we insist further, that the action of the State board of equalizers was conclusive of this question. Whether appellee was engaged in business and dealing as a merchant in the city of Memphis, was one of fact and upon every matter involved in the determination of this question, it is specifically provided by statute that the action of the State board of equalizers shall be final and conclusive. By statute it is provided:

"The action of the State board of equalizers shall be final and conclusive as to all matters passed upon by the board and taxes shall be collected upon the valuations so fixed and found by said board."

Acts of 1901, ch. 174, sec. 38, sub-sec. 10.
Acts of 1899, ch. 435, sec. 39, sub-sec. 10.
Grundy County *vs.* Tennessee Coal Co., 94 Tenn. 305.
Ward *vs.* Alsup, 100 Tenn. 750.

Appellee is not Protected from Taxation by the Commerce Clause of the Federal Constitution.

The contention of appellee that it is protected from taxation in Tennessee by the commerce clause of the Federal Constitution, is based upon the following propositions:

1. That from the time the goods are shipped from the factory of appellee until delivered to the purchaser, they were *in transitu* and
247 therefore not liable for taxes.

That from the time the goods were shipped from the factory of appellee until delivered to the customer, they were in the original packages and as such not taxable.

Let us examine these contentions in the order stated above:

First—How are the facts?

The goods are shipped from the factory of appellee to itself at Memphis, where they are stored and insured by appellee, and it is clear from the proof that the goods remain the property of the appellee until actually delivered to the purchaser. It can not be claimed that these goods are shipped to any particular person other than appellee and therefore they can not be in transit from appellee to any particular one of its customers.

The fact is, as shown above, the goods are assembled at Memphis, in a general and unmarked mass for the conveniences of trade, just as any other merchant assembles his goods and has them shipped to himself; and these goods in the warehouses in Memphis are as completely at rest and the property of the appellee as they were in the factory, and until the "specification" or "requisition" is delivered by the customer to the warehouse it is not known whether he will take any particular amount or kind of goods.

So it is clear that these goods so assembled in the warehouses in Memphis are there, not in transit but at rest, and in which condition they have become a part of the general mass of property in the State.

Between the factory and warehouse are three different services (1) the shipment by barge or rail; (2) unloading by the Patterson Transfer company; (3) transfer to the warehouse; and for each of these services a different compensation is provided and in addition thereto the service of storage is rendered by the Patterson Trna-fer
248 Company separate and distinct from its other services and upon a different compensation, and, if your honors please, which is very material, upon a different responsibility or liability from that which it assumes as a common carrier. Therefore, we confidently submit that these goods were not in transit when they rested in the warehouses in Memphis. In support of our contention, we cite your honors to the following authorities:

Coe *vs.* Errol, 116 U. S. 517.
Nelson Lumber Co. *vs.* Lorraine, 22 Fed. Rep. 554.
Kelley *vs.* Rhodes, 39 L. R. A. 594.

Second. Shall appellee escape taxation because its goods, when delivered to the customer were in substantially the same packages as when shipped from the factory?

If an affirmative answer be given to this question as ap-lied to the facts of this case, then every wholesale merchant in Tennessee buying from a mnaufacturer or merchant in another State can escape taxation by simply continuing the goods purchased by him in their original packages and in such form selling and delivering them to the customers. But we submit that this is not, and never, was the law.

The case of Brown *vs.* Maryland, so much relied upon by appellee, does not sustain the position contended for by appellee, but on the contrary when that opinion is analyzed it will be found to sustain and justify the assessment of the property of appellee.

The question involved in that case was whether an importer paying duty to the United States, could be, by the State of Maryland, compelled to pay a license fee before engaging in business in that State, and the decision of the Supreme Court of the United States was adverse to the license fee or tax sought to be imposed by the State of Maryland, but there is nothing in that decision which would justify the contention that the goods, when they be-
249 come incorporated into the general mass of property, were attended with immunity from taxation. The principal ques-

tion to be determined here is one of fact and that is whether or not the goods of appellee stored in the warehouses in Memphis had become a part of the general mass of property in this State and with all due respect to the learning and ability of eminent counsel for appellee, we do not understand how any other contention can be fairly made upon this record.

Even if the finding of the State board of equalizers upon this particular question is not conclusive, there is no doubt but that after its decision the burden is upon the appellee; yet, upon the facts of this case, we respectfully insist that the goods shipped by appellee to itself at Memphis and there stored, to be delivered to such of its customers as might desire to buy them, or to complete executory contracts of sale previously entered into, became incorporated and commingled with the general mass of property in the State of Tennessee, and in this condition—whether the goods remained in the original packages or not—they are taxable. As soon as the goods are in the State and become part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character.

Brown *vs.* Houston, 114 U. S. 622.

When goods are sent from one State to another for sale or in consequence of a sale, they become part of the general property and amenable to its laws; provided, that no discrimination be made against them as goods from another State, and that they are not taxed by reason of being brought from another State, but only taxed in the usual way as other goods are.

Emmert *vs.* Missouri, 156 U. S. 296.
Woodruff *vs.* Parham, 8 Wal. 123.
May *vs.* N. O. 178 U. S. 496.
Judson on Taxation, sec. 149.

250 *It is not a Discriminating Tax.*

A careful examination, both of the constitution of Tennessee, and of the statutes under consideration in this case, will disclose that neither in the constitution nor the statutes is there a purpose to discriminate in favor of the manufacturers of Tennessee and against the manufacturers of other States, and, because under the constitution of Tennessee, certain articles manufactured out of the produce of the State shall not be taxed, except to pay inspection fees, there is in no sense a discrimination against appellee or manufacturers in other States; because any one may come into Tennessee and manufacture articles of all kinds out of the produce of the State. The contention of appellee on this point is unsound in principle, and is not justified upon authority.

Judson on Taxation, sec. 149.
New York *vs.* Roberts, 171 U. S. 658.
Kurth *vs.* The State, 86 Tenn. 134.

In any Event Appellee is Liable for Taxes on Its Property and Therefore Not Entitled to Recover the Taxes Paid by it.

There is no complaint that the valuation made by the county court clerk in assessing the property and affirmed by the State board of equalizers was excessive, and indeed we think that the proof would have justified a much larger assessment. Now whether the appellee was engaged in business as a "merchant" and as such liable for the taxes assessed, there can be no doubt but that the property accumulated by it in Memphis, whether it was brought there to be sold or brought there is consequence of a sale already made, became incorporated with the general mass of property in the
251 State, received the protection of the laws of the State and is therefore amenable to such laws and being so amenable can not escape taxation. Without in any way abandoning the contention that the appellee was engaged in the business of a merchant, we respectfully submit that in any event appellee is liable for a tax upon its goods and property in Memphis. And being so liable, and never having discharged that liability and paid the taxes justly assessable against it, and the assessment involved in this case being in all respects fair as to amount of valuation, the appellee can not recover the taxes paid by it.

When it came into a court of equity seeking recovery of taxes paid by it under protest, it must do equity and discharge the taxes for which it is liable before it can recover taxes in which there may be a technical error or irregularity in the mode and method of assessment. "If the property is subject to a tax, and the amount is justly and equitably due, there can be no recovery for mere irregularities in the detail or mode of assessment."

2nd. Dillon on Municipal Corporations, (4th. ed.) 939.

There being an obligation upon appellee to pay taxes justly and properly assessable against this property, there can be no implied promise in its favor by the State to repay the taxes paid under protest in this case.

Curtis *vs.* Fielder, 67 U. S. 276.
Collector *vs.* Hubbard, 12 Wal. 112.

Therefore, we respectfully submit that appellee should be repelled from a court of equity and its bill dismissed.

CHARLES T. CATES, JR.,
Attorney-General.

252 AMERICAN STEEL & WIRE CO. vs. R. A. SPEED, Clerk.

Opinion.

This suit was instituted in the chancery court of Shelby county, to recover $1031.44, a merchant's tax assessed against complainant by R. A. Speed, clerk of the county court of that county, and which was paid by complainant under protest, on the 18th of Oct., 1902. The chancellor rendered a decree in favor of complainant, and the cause is now in this court on appeal of the defendant clerk.

The facts upon which the controversy arises are as follows.

Complainant is a corporation created under the laws of New Jersey. Its situs is in the State of New Jersey, and its principal business office is situated at Chicago, Illinois. It is engaged in the manufacture of nails, staples, barbed and smooth wire, at different points north of the Ohio river. None of its manufactories are situated in Tennessee, and all of its products consigned to Memphis are shipped from points beyond the limits of this State.

Prior to the first of February, 1900, its manufactured products were sold and distributed throughout the Southwest, from Louisville, Ky.; Memphis, Tenn.; Greenville, Vicksburg and Natchez, Miss.; and New Orleans, La. About that time the Patterson Transfer Company, a corporation created under the laws of Tennessee, having its situs at Memphis, and doing business at Memphis, represented to appellee that Memphis was the most available point in the Southwest at which to mass and distribute its manufactured products to its customers in that section. At this time, and for many years prior thereto, the Patterson Transfer Company had been engaged in the business of transferring passengers and freights to and from the various depots at Memphis and from the landings on the Mississippi river. Appellee entered into an arrangement with the Patterson Transfer Company, whereby said company was to receive its manufactured products at Memphis, assort them so as to separate the different kinds of nails, staples and wire, and them
253 to deliver them, either to the jobbers at Memphis, or to the jobbers beyond the limits of Tennessee, over the various lines of railroads and steamboats running into Memphis, as directed by complainants.

None of complainant's products are ever sold to the Patterson Transfer Company, or are by it sold to others, and neither its officers or employees have any knowledge whatever of the price at which goods are sold by complainant. Under the arrangement between them, the business of the Patterson Transfer Company, in connection with complainant's products, is confined to their transfer to the warehouses, their assortment in the warehouses, the keeping of them in storage, and their subsequent delivery to the customers of the complainant, under its general or special orders, as below indicated.

The goods of complainant are manufactured at different points, and it is convenient and useful from a business point of view, to mass them at some place at which they can be assorted, and from which they can be distributed to complainant's customers. It is impra-ticable to assort the goods either at the river landing or at the railroad depots when they reach Memphis, and in order to facilitate the work, the Patterson Transfer Company has rented three warehouses, in which the goods are stored for the purpose of assortment and distribution, and for other purposes below indicated. These warehouses are rented exclusively for this purpose, and the manufactured products of complainant and no other goods, are stored therein.

The evidence further shows that, as a general rule, prior to the time the goods are shipped to Memphis, sales agents of the complainant canvass the Southwestern country, and make contracts exclusively with jobbers; and in each instance where a contract is made, it is embodied in writing, on a form prepared by complainant in which is set down the amount of goods which constitutes the subject of the contract, and the time agreed upon within which they are to be delivered. The goods so contracted for are described as so many kegs of nails, so many kegs of staples, so many reels of barbed wire, or so many coils of smooth wire, according to the
254 terms of the contract, in respect of the quantity agreed upon. But the contract does not specify the grade and quality of the goods desired. The grade and quality are left open, to be subsequently specified when the customer desires a delivery, as below stated. The customer can, when he makes his specification, select any grade of goods he desires, and upon so selecting they will be delivered to him, up to the quantity contracted for, within the time agreed upon, at prices contracted for applicable to the several grades. In fixing the price of its goods, the complainant always, except when necessary to lower prices in order to meet competition, figure in the freight on the goods.

As above indicated, it is shown in the evidence that there are many different kinds of nails, as well as different kinds of barbed and smooth wire, and it is expressly stipulated in the contract that the customer shall have the privilege of specifying, during the life of the contract, the kind of wire, or kind of nails or staples he desires delivered to him under the contract. These contracts also specify from sixty to ninety days as the time within which the products are to be delivered, and at any time during the period prescribed in the contract, the customer may designate the kind of goods he desires delivered under it.

These contracts are made, usually, before the goods arrive at Memphis, their point of destination, and generally the contracts are made in advance of the production of the goods at the complainant's factory. Usually the sales agents of the complainant, not only in advance of the shipment of the goods, but in advance of their production, canvass the southwestern country, in the manner above stated, visiting the various jobbers, ascertaining the amount of

goods they will require within sixty or ninety days, and, the contract is prepared, to the purport above indicated, in which the complainant obligates itself to deliver, at the prices stated, as above mentioned, the amount of goods contracted for therein, and the customer agrees to receive and pay for that quantity upon the goods being delivered to him after he shall have made, and according to,
255 his specification, which he may make during the life of the contract; the customer reserving the right, in the face of the contract, to specify the exact grade or quality of goods he desires delivered under it. He does this after the making of the contract, and at any time he desires to do so, within the life of the contract, by writing out his specification showing precisely what grade of goods he desires, and forwards this specification to the office of complainant in Chicago, and then the goods, under an order from the Chicago office, addressed to the Patterson Transfer Company at Memphis, are selected by the latter out of the mass of goods belonging to the complainant in the aforesaid warehouses in Memphis, and are shipped by the said Patterson Transfer Company to the customer who has signed the specification. This order from the complainant to the Patterson Transfer Company is effected through the agency of a copy of the specification which is forwarded to the latter from complainant's central office at Chicago; it being understood according to the course of business between the two companies, that the Patterson Transfer Company, will select out of the mass of goods those set out in the specification, and will ship them to the customer whose name is signed to the specification, upon receiving such copy of the specification from the central office at Chicago.

This method of transacting the business is modified in practice, in so far as the fulfillment of the contracts made with the jobbers at Memphis is concerned. For the convenience of the Memphis trade, complainant advises the Patterson Transfer Company of the names of its customers at Memphis, and that company is instructed to deliver the goods embraced in the contracts with the Memphis jobbers, in the following manner. The Memphis jobber makes out his specification in duplicate, and addresses a letter to complainant as in any other case; but, instead of forwarding this letter and his specification directly to complainant, he delivers the letter to the Patterson Transfer Company, and the Patterson Transfer Company at once delivers the goods so specified, attaching the dray receipt to a copy of the specification, and forwards the specification, letter and
256 dray receipt to the office of complainant in Chicago, and that office makes out an invoice and sends it directly to the jobber.

Another variation is made in the course of the business, in favor of the Memphis jobber to the following effect. Any jobber in Memphis who is a recognized customer of the complainant, can, without any previous written contract, or other special agreement, make out a specification of the goods he desires and hand this, in duplicate form, to the Patterson Transfer Company. Upon this being done, it is the duty of the Patterson Transfer Company, under its general instructions from the complainant, to select out of the mass of goods

in the warehouses, goods corresponding to those contained in the specification and deliver them to such jobber, this delivery being usually made by the next day, or at most, within two or three days. Other deliveries, on specifications sent direct to the Chicago office, are not usually made within less than six or eight days, and some times a longer period is required. When the Patterson Transfer Company receives from Memphis jobbers the specifications which are the special subject of this paragraph, one copy is kept by it, and the other copy is forwarded to the office at Chicago, where upon its arrival and reception, the customer is charged with the goods specified, at current prices.

The testimony shows that of the mass of goods kept on hand in Memphis in the above mentioned warehouses, about ninety per cent. ultimately goes to jobbers who reside outside of Memphis and beyond the limits of this State. The remaining ten per cent. goes to the Memphis jobbers in fulfillment of the general contracts previously referred to, pursuant to specifications thereunder made, and under specifications made without previous written contracts, the latter covering about two and one-half per cent. of all the goods kept on hand.

No one but an agreed or recognized customer of the complainant can make out a specification, or have goods delivered from the storehouses of the Patterson Transfer Company; and no goods are ever delivered or distributed to any one by the Patterson Transfer
257 Company except under the express directions of complainant or under general directions given by complainant to the said Patterson Transfer Company, in favor of recognized and approved customers of the complainant whose names are furnished by it to the Patterson Transfer Company.

The testimony further shows that the quantity of goods which the complainant keeps on hand at Memphis fluctuates considerably, owing to the state of trade from time to time. Sometimes the stock is as low in value as $30,000, and sometimes the complainant has on hand a stock of the value of more than $100,000.

Some of the goods, a very small amount, are shipped to Memphis by rail. Nearly all of these goods which come to the hands of the Patterson Transfer Company from this complainant are transported to Memphis on barges belonging to transportation companies in which complainant has no interest, and which are engaged in the carrying trade. As a general rule, while the complainant endeavors to secure contracts covering its out-put before the goods are manufactured, yet it does not always do so, but taking advantage of the seasons when there is a good stage of water in the rivers which must be used in floating its products from its mills to Memphis, it masses its goods at the latter point, in anticipation of future sales.

The testimony shows that when goods are shipped from complainant's mills, consigned to Memphis, the Patterson Transfer Company is notified by the Chicago office that a certain quantity of complainant's products were shipped at a certain time on barges to the port at Memphis. These barges are met at the river landing by the

Patterson Transfer Company, which receives the goods, transfers them to its warehouses and assorts them. Then from time to time it ships the goods on specifications as before explained. On receiving the goods they are credited to the complainant on the books of the Patterson Transfer Company, and on being shipped out they are charged on the same books to the complainant. When the goods reach Memphis they are always consigned to the complain-
258 ant, in care of the Patterson Transfer Company.

All of the goods forwarded to Memphis are products of the factories of complainant. No part of them are ever purchased by it. Its sales agents are exclusively engaged in selling these products. They are produced by complainant beyond the limits of this State, and are made the subject of contracts by its sales agents throughout the Southwest in the manner before explained. These sales agents report all contracts effected by them, directly to the office in Chicago, whether made with the jobbers at Memphis or elsewhere beyond the limits of this State. All invoices for goods when sold by specifications in the manner above stated are made out at the office at Chicago, and forwarded directly to the customer, in the manner and under the circumstances previously stated.

Some of complainant's goods are produced at one factory and some at another, and consequently when a purchaser contracts for the delivery to him within sixty or ninety days, of a certain number of packages, it frequently turns out that some of the goods desired are the product of one factory, and some of another, and it is accordingly most convenient in the conduct of complainant's busines- that goods from complainant's various factories should be massed at some point where they can be dealt with in the manner before explained.

Complainant's goods are put up in the following original packages. The nails and staples are put up in kegs, each keg weighing 100 pounds; the smooth wire in coils tied by wires, and each coil weighing 100 pounds; the barbed wire on reels, the wire on each reel weighing 100 pounds. Each package is separately and distinctly made up at the factories for convenience of transportation, and is, in this form delivered to the common carriers. In this form they are delivered at the initial point of transportation. In this form they are transported in barges or by railroad to Memphis, and received by the Patterson Transfer Company. In this form they are assorted at the warehouses by the Patterson Transfer Company, and de-
livered by it to the complainant's customers at Memphis,
259 under the circumstances previously stated, or to the various lines of steamboats and railroads running out of Memphis, consigned, under circumstances previously stated, to customers beyond the limits of Tennessee, and in this form they ultimately come to the hands of complainant's customers in such foreign States. Each package is separate and distinct in itself, and while no particular package is consigned to any special customer, each keg of nails and staples is marked so as to show exactly what the package contains, and each coil and reel of wire is marked with a tag show-

ing what the coil or reel contains, and no package is ever changed in any particular, from the time it leaves the factory until it ultimately reaches the hands of the customer.

The testimony shows that Memphis has within recent years become, by reason of its accessibility to railway and river transportation, a great distributing point, and it was selected as the basis of the operations which are the subject of the present controversy, by reason of these exceptional advantages.

Other facts proven by the complainant are as follows. The testimony of Mr. Young, the tax assessor, shows that none of the cotton shipped into Memphis from the surrounding States, pays any tax whatever, and that the manufacturers of lumber in Memphis pay no tax on lumber made from logs which are produced from the soil of this State.

There is also an agreement of counsel to the effect that there are large iron deposits in Tennessee, and a number of furnaces in this State engaged in the manufacture of iron from the iron ore deposits in this State.

The bill alleges, and the answer admits, that complainant was assessed by the defendant clerk as a merchant, and was required to pay to the State a merchant's tax for the years 1901 and 1902, amounting to $1031.44. On appeal to the State board of equalizers, this assessment was affirmed, and thereupon, within the time required by law, to wit—on the 18th day of October, 1902, complainant paid these taxes under protest. This suit was instituted by complainant within the time prescribed by the statute, to recover the taxes so paid, on the ground that the assessment was illegal and void for the following reasons:

260

1. Because complainant was never, at any time, a merchant doing business at Memphis.

2. That the assessment was in violation of article 1, sec. 8, subsec. 3 of the Constitution of the United States, which empowers Congress "to regulate commerce with foreign nations, and among the several States, and among the Indian tribes."

We shall now briefly consider the points raised in argument, in this court.

It is insisted that the complainant was not a merchant; but we think it was a merchant within the sense and meaning of our act of 1901, ch. 174, sec. 27. This section reads as follows: "The term 'merchant' as used in this act, includes all persons, co-partnerships, or corporations engaged in trading, or dealing in any kind of goods, wares or merchandise, * * * whether such goods, wares or merchandise be kept on hand for sale, or the same be purchased and delivered for profit as ordered."

Under the facts proven in this case, the complainant was "dealing" in nails, staples, and wire, in the city of Memphis, at the time it was assessed for taxes, and had been since February, 1900, and for a short time prior thereto. It is immaterial that its agent at Memphis, the Patterson Transfer Company, had no authority to fix prices, but only kept the stock and delivered the goods on contracts

made with the office at Chicago, said deliveries being made under orders issued from Chicago, either special, or to be inferred from the general course of business. The vital fact is that the goods were not sold from their place of manufacture, but were kept in stock at Memphis, and this stock was drawn on from time to time to fill contracts of sale made by the company's salesmen, or to fill contracts made by means of intending purchasers depositing specifications of goods desired, with the Patterson Transfe- Company, and in that man-
261 ner obtaining the goods. It is insisted that complainant was only a manufacturer selling its goods as any other manufacturer. In Taylor *vs.* Vincent, 12 Lea 284, it is said that if the manufacturer of an article be engaged in selling it as a business, he may be taxed for the privilige of doing so, as a tax upon his occupation, or as a privilige; but that if he sells from his place of manufacture in unbroken packages, as a manufacturer, he cannot be taxed as a dealer. A later case (Kurth *vs.* The State, 86 Tenn. 134), goes further, and holds that a manufacturer of liquors cannot sell without taking out license as a dealer. This latter case had reference to sales at retail, but in another case (Webb *vs.* State, 11 Lea 662), the same rule was applied to manufacturers selling to wholesale liquor dealers. And in Kurth *vs.* State, in referring to Taylor *vs.* Vincent, it was said: "The case of Taylor *vs.* Vincent is pressed upon us as determining that a dealer is one who buys to sell again. In this we do not concur. But this proposition is no part of the decision of the case, and was only used in argument by the judge delivering the opinion of the court. The decision in that case only goes to the point of deciding that, under the revenue laws of 1881 and 1883, a manufacturer of liquors from the produce of this State, who sold at his place of manufacture to dealers in unbroken packages was not a wholesale dealer within the meaning of these acts."

There is an earlier case (State *vs.* Smith, 5 Hump. 394), construing the act of 1835–6, chap. 13, sec. 5, which takes the contrary view, but this is not controlling under the language of the act of 1901, and the later cases above referred to.

It is next insisted that the act taxing the goods was a violation of the provision of the Federal Constitution above referred to, because the goods were in course of transit from one State to another at the time the tax was levied. We do not think that this position is well taken. Under the method of business pursued by the complainant, these goods had been sold to no one, nor were they in course of transit for the purpose of being put directly upon the market. The warehouse of the Patterson Transfer Company
262 was in the nature of a permanent place of deposit, where complainant's goods were gathered together and were left to await the orders of customers, and from the mass so created goods were from time to time drawn to meet the wants of customers, and as called for by them. It is true, that an effort was generally made to get agreements from intending purchasers that they would take the out-put of complainant's mills before the goods were manufactured, and that usually enough of these contracts were in existence, and

calling for a sufficient quantity of goods, to cover the expected output for sixty or ninety days, the time during which these contracts usually ran; but these contracts did not constitute sales. They were only agreements to the effect that during the sixty or ninety days next ensuing their date, such intending purchasers would take such and such a quantity of complainant's goods, say 1,000 kegs of nails, or 1,000 kegs of staples, or 500 coils of wire. But there were many kinds and grades of nails, and this class of goods varied very much in size, running from four penny to twenty penny nails. There were also different grades of staples. And as to wire, there were several kinds; first the two general classes of smooth wire and barbed wire, also wire galvanized, and wire not galvanized. And in barbed wire there were different grades, based on the number of points or barbs, as two-point, and three-point wire, &c. Any customer of the complainant who had contracted to take a given quantity of complainant's nails, as 1000 kegs, had the right to select at any time within the sixty or ninety days covered by his contract the kind of nails he would take. He might, if he chose, call for, and receive all of one kind, or some of each kind, or in any proportion, as respects the several kinds, that he desired. So with the staples. And so of the wire. He might specify during the sixty or ninety days so many coils of smooth wire galvanized, so many coils not galvanized, so many reels of barbed wire two-point, and so many reels of barbed wire three-point. At the time these contracts or agreements were entered into, neither the complainant nor its customers knew how much of any kind of complainant's goods would
263 be called for. Hence there was no meeting of the minds of the parties as to an essential term of the contract. These contracts were nothing more than options extended to complainant's customers to select from complainant's stock of goods, within a given time, such articles as they might desire, up to and not to exceed an agreed quantity, the price of each article (kegs of nails, kegs of staples, coils of wire, and reels of barbed wire), composing the mass being fixed for the time agreed upon, and the customer being allowed to select within the time such articles as he desired, with the understanding that they were to be charged to him at the price ruling, as per agreement, during the sixty days, or other time agreed upon. Nor was the customer under the contract, bound to take all of the goods at one time. He had the right, according to the contract, and the usage of the business, to specify and select all at one time, or to specify and select different parts of the agreed aggregate for the sixty or ninety days, at different periods or on different days during that period. The substance of the contract, agreement, or arrangement, between the complainant and any given customer may be thus expressed. On his part, the customer said: During the next sixty days, I will take from you 1000 kegs of nails, or 1000 kegs of staples, and 1000 coils of wire, reserving to myself the right to select from the mass of your goods such and so much of the many different kinds of goods which you have of the classes referred to as I may desire, provided I do not go beyond the aggregate quantity

of each general class (nails, staples, and wire), above indicated; the price for each of the several grades, and kinds of the several classes of goods, to be thus and thus. Or, to state the matter from the complainant's point of view, the substance of the negotiation between the parties, in general, may be thus set down, viz: During the next sixty days I will sell you my goods at the following schedule of prices, (stating prices); what quantity will you take during that period? The customer replies in substance, I will take 1000 kegs of nails, 1000 kegs of staples,
264 and 1000 coils or reels of wire, of such kinds as I may specify of the several kinds or grades of nails, and of the several kinds of staples, and of the several kinds of wire, during the next sixty days, at the prices offered. Here, it is manifest that there being no agreement as to the amount of each kind or quality of goods in advance, and there being no means of making certain these matters, except through the uncontrolled choice of the customer, there can be no means of determ-ing the sum due, until there is a selection made by the customer in any given instance.

As appears from the statement of facts above, complainant has all the time a large number of such contracts running in this State, and in Arkansas, Texas, and other States in the Southwest, and keeps on hand its stock of goods to meet them, that is, to fill such orders or "specifications," as its customers may from time to time make, the orders, in general, being sent to complainant's Chicago office, and from that office the directions being sent in the manner set forth in the statement of facts, to the Memphis branch to fill the orders by shipping the goods to the customer so ordering or "specifying."

Likewise, as appears from the said statement of facts, complainant, from time to time, as occasion offers, has, through its agent, the Patterson Transfer Company, dealings with its recognized customers among the merchants of Memphis, without the formality of such previous written contracts, allowing these merchants to select or "specify" whenever they desire goods, and imposing upon the Patterson Transfer Company the duty to deliver promptly to such merchants whenever calls are made, without any previous notification to the office at Chicago, or negotiations therewith.

The goods kept on hand at Memphis, in the stock referred to, must be regarded as kept on hand for this purpose also.

And it is important at this juncture to note, as shown in the statement of facts, that the fact last stated is not the only evidence that the goods are not massed at Memphis merely for the purpose of meeting the general contracts above referred to, previously
265 made in and through the Southwest; on the contrary, as previously stated, it appears that the complainant takes advantage of the stages of the water in the rivers over which it ships its goods in barges, to float down large quantities of its goods, in anticipation of sales, and to have them ready, against a time when the waters may be so low that shipments can not be made by that means, but only by the more expensive method of railroad transportation.

We do not think that, under these circumstances, it can be justly said, that the goods were in transit from one State to another, when the tax was assessed.

It is next said, that the complainant was not liable to taxation on its goods, because they were sold in the original packages. We do not think that this is a sound view, because the facts above stated show that complainant's goods were put up for sale in Memphis, and were so dealt with as to make them a part of the common mass of property in the State. Brown *vs.* Houston, 114 U. S. 622; Pittsburgh &c. Co. *vs.* Bates, 156 U. S. 539; Woodruff *vs.* Parham, 8 Wall. 123; Henson *vs.* Lott, *id.* 148; Coe *vs.* Errol 116 U. S. 513. And see Emmert *vs.* Missouri 156 U. S. 296.

Much stress is laid by complainant's counsel upon Brown *vs.* Maryland, 12 Wheat. 436; Leisy *vs.* Hardin, 135 U. S. 100; Lyng *vs.* State 136 U. S. 161; Welton *vs.* Missouri 91 U. S. 275; Robbins *vs.* Shelby County Taxing District 120 U. S. 429; Leloup *vs.* The Port of Mobile, 127 U. S. 641, and the case of Asher *vs.* Texas, 128 U. S. 129. We do not think there is any real conflict between any of these cases and those which we have cited in support of our conclusion; nor have the cases which we have cited ever been overruled by the Supreme Court of the United States. We are also referred by counsel for complainant to several cases decided by the courts of other States, upon the Federal questions involved, but these are, of course, not controlling on such questions, and they need not be specially examined or commented upon.

From some of the evidence which was introduced by the complainant, and which we have referred to in the last part of
266 the statement of facts, it would seem that the complainant intended to support the contention that the tax assessed against it was a discriminative one, in favor of goods manufactured out of the produce of this State, and against those manufactured out of the produce of other States. There was such a contention made in the bill, but it is unnecessary, now, to go into this question at all, because the complainant conceded that if it is to be, or rather can lawfully be, treated as a merchant, then the objection could not apply, because there is no discrimination in this State in respect of the origin of goods when they are in the hands of merchants. Jenkins *vs.* Ewin, 8 Heisk. 456–484. Complainant concedes that such contention could be raised only against a direct tax, and there is no such tax involved in this case. The tax assessed must stand or fall as a merchant's tax. Hence the question of a discriminative tax does not arise in this case, and need not be considered. The tax which is under consideration in the present case has no element of discrimination against the complainant as a foreign dealer, or otherwise, and hence cannot be objected to on that ground.

It results that the decree of the chancellor must be reversed, and the bill dismissed with costs.

Filed June 9, 1903. NEIL, *J.*

JNO. W. BUFORD, *Clk.*

267 THE STATE OF TENNESSEE:

Pleas before the supreme court of said State, for the western division thereof, at the April term, A. D. 1903.

Present: The Hon. W. D. Beard, chief justice, and J. S. Wilkes, W. K. McAlister, M. M. Neil, and Jno. K. Shields, associate judges, when the following proceedings were had, to-wit:

JUNE 9, 1903.

AMERICAN STEEL & WIRE COMPANY, Appellee, vs. R. A. SPEED, Appellant.	No. 31, Shelby County Chancery.

Be it remembered that this cause came on to be heard upon the transcript of the record from the chancery court of Shelby county, Tennessee, and it appearing that appellant, as clerk of the county court of Shelby county, Tennessee, on the 8th day of August, 1902, back assessed appellee's property, situated in Shelby county, Tennessee, for the years 1901 and 1902, and for the purposes of said assessment required appellee to pay a merchant's tax on a valuation of $72,326, for the year 1901, and a merchant's tax on a valuation of $166,275 for the year 1902, and further required appellee to pay a merchant's privilege tax on ten per-cent. of each of said valuations for said years; the said tax so assessed amounting, with costs, commissions and fees to the sum of $1,031.44; and it further appearing that on the 18th day of October, 1902, that appellee paid the said sum of $1,031.44 to the said R. A. Speed, as clerk of the county court of Shelby county, under protest, and that this suit was instituted by appellee against appellant to recover the same:

It is now, on due consideration, ordered and adjudged that the contention of appellee that the assessment and collection of said taxes were null and void, because contrary to article 1, section 8, sub-section 3 of the Constitution of the United States, which
268 provides that "Congress shall have power to regulate commerce with foreign nations, and among the several States and among the Indian tribes," is not well taken, and said contention is now overruled on the ground that said assessment, and the collection of taxes thereunder, were not repugnant to the Constitution of the United States, but in all respects legal and valid.

It is further ordered and adjudged that the claim aforesaid of protection under the Constitution of the United States be, and the same is hereby denied, the decree of the chancery court of Shelby county is hereby reversed, and the bill dismissed.

Appellee will pay the costs of this court and the court below, for which execution may issue.

269 *Assignments of Error.*

AMERICAN STEEL & WIRE COMPANY, Appellee,
vs.
R. A. SPEED, Clerk of the County Court of Shelby County, Tennessee, Appellant.
} No. 31, Shelby Chancery Docket.

Comes the appellee, American Steel & Wire Company and says that in the record and proceedings in the above entitled cause, there is manifest error, and it assigns for error the following decree of the supreme court of Tennessee:

"Be it remembered that this cause came on to be heard upon the transcript of the record from the chancery court of Shelby county, Tennessee, and it appearing that appellant, as clerk of the county court of Shelby county, Tennessee, on the 8th day of August, 1902, back assessed appellee's property situated in Shelby county, Tennessee, for the years 1901 and 1902, and for the purposes of said assessment, required appellee to pay a merchant's tax on a valuation of $72,326, for the year 1901, and a merchant's tax on a valuation of $166,275 for the year 1902, and further required appellee to pay a merchant's privilege tax on ten per-cent. on each of said valuations for said years—the said tax so assessed, amounting with costs and fees, to the sum of $1,031.44; and it further appearing that, on the 18th day of October, 1902, that appellee paid said sum of $1,031.44 to the said R. A. Speed, as clerk of the county court of Shelby county, under protest, and this suit was instituted by appellee against appellant to recover the same, it is now on due consideration, ordered and adjudged that the contention of appellee that the assessment and collection of said taxes were null and void, because contrary to article 1, section 8, subsection 3 of the Constitution of the United
270 States, which provides that, 'Congress shall have power to regulate commerce with foreign nations, and among the several States, and among the Indian tribes,' is not well taken, and said contention is now over-ruled on the ground that said assessment, and the collection of taxes thereunder, were not repugnant to the Constitution of the United States, but on the contrary, in all respects valid.

"It is further ordered and adjudged that the claim aforesaid of protection under the Constitution of the United States be, and the same is hereby denied, and the decree of the chancery court of Shelby county, Tennessee is hereby reversed, and the bill is dismissed. Appellee will pay the costs of this court and the court below, for which execution may issue."

Because appellee, American Steel & Wire Company says, that in and by said decree so entered by the supreme court of Tennessee, said court proceeded erroneously to hold that said assessment was

not in contravention of article 1, section 8, sub-section 3 of the Constitution of the United States, which provides that "Congress shall have the power to regulate commerce with foreign nations, and among the several States, and among the Indian tribes."

Appellee also assigns for error as fol-ows:

1. That in and by said decree so entered by the supreme court of Tennessee, the supreme court proceeds erroneously to hold that the goods of appellee were not the subjects of interstate commerce, because imported into Tennessee in the original packages of commerce, and there offered for sale in the original packages.

2. That in and by said decree so entered by the supreme court of Tennessee, said court proceeded erroneously to hold that the goods of appellee were not *in transitu* from the initial point or points of transportation to the place or places where they were to be delivered to the purchas-rs from appellee.

3. That in and by said decree so entered by the supreme court of Tennessee, said court proceeded erroneously to hold that
271 said assessment did not operate to discriminate between appellee, a citizen of the State of New Jersey, whose goods were manufactured out of the produce of other States, because of their foreign origin, and similar goods manufactured out of the produce of Tennessee.

4. That in and by said decree so entered by the supreme court of Tennessee, said court proceeded erroneously to deny the claim of appellee that said assessment, and the collection of taxes thereunder, were in contravention of the Constitution of the United States, and to hold that said assessment was valid, and to reverse the decree of the chancellor, and to dismiss appellee's bill.

Wherefore, appellee, American Steel & Wire Company, prays that the said decree may be reversed.

JOSIAH PATTERSON,
S. M. NEELY,
W. B. HENDERSON,
Counsel for Appellee.

Filed June 13, 1903.

JNO. W. BUFORD, *Clk.*

272 AMERICAN STEEL & WIRE COMPANY, Appellee, vs. R. A. SPEED, Appellant. } No. 31, Shelby Chancery Docket.

I, William D. Beard, chief justice of the supreme court of Tennessee—the highest court in the State of Tennessee, either at law or in equity, composed of William D. Beard, chief justice, Wm. K. McAlister, John S. Wilkes, M. M. Neil and John K. Shields, associate justices, do hereby certify that in the above styled cause lately pending in the supreme court of Tennessee, and decided against the appellee, The American Steel & Wire Company, there was drawn in

question the validity of a certain back assessment made by the appellant, R. A. Speed, as clerk of the county court of Shelby county, Tennessee, whereby the property of appellee, The American Steel & Wire Company, situated in Shelby county, Tennessee, was, for the purposes of taxation, estimated at a valuation of $72,326, for the year 1901, and a valuation of $166,275, for the year 1902, and appellee was required to pay, in pursuance of said back assessment, taxes, which with costs, commissions and fees, amounted to the sum of $1,031.44.

I further certify that at the hearing of said cause in the supreme court of Tennessee, appellee, The American Steel & Wire Company, claimed and insisted that said assessment was null and void, because it was contrary to article 1, section 8, sub-section 3 of the Constitution of the United States, which provides that "Congress shall have power to regulate commerce with foreign nations, and among the several States, and among the Indian tribes."

I further certify that the supreme court of Tennessee held and adjudged that the assessment and collection of said taxes were not
repugnant to the Constitution of the United States, and the
273 contention aforesaid was overruled, and the claim that the
property of appellee, The American Steel & Wire Company, was protected from taxation under the Constitution of the United States was denied, and the bill dismissed.

Witness the Honorable William D. Beard, chief justice of the supreme court of Tennessee, this 11th day of June, 1903.

WILLIAM D. BEARD,
Chief Justice.

O. K. Carroll.

Filed June 11, 1903.

JNO. W. BUFORD, *Cl'k*,
By T. W. POPE, *D. C.*

274 *Cost Bond.*

Filed June 11, 1903. Jno. W. Buford, Cl'k, by T. W. Pope, D. C.

AMERICAN STEEL & WIRE COMPANY, Appellee, *vs.* R. A. SPEED, Appellant. } No. 31, Shelby Chancery Docket.

Know all men by these presents, that we, The American Steel and Wire Company, as principal, and Ben. R. Henderson, and S. M. Neely as sureties, bind ourselves jointly and severally unto the State of Tennessee, in the sum of one thousand ($1,000) dollars for the payment of which well and truly to be made, we bind ourselves and representatives firmly by these presents.

But the condition of this obligation is such, that whereas, the above bounden American Steel & Wire Company, a corporation by the laws of the State of New Jersey, has obtained, or is about to obtain, a writ of error to the Supreme Court of the United States of America, from the supreme court of the State of Tennessee sitting at Jackson, for the western division of said State, to reverse a judgment rendered by it at its April term, 1903, wherein the bill of the said American Steel & Wire Company in the above styled cause, to recover certain taxes paid the State of Tennessee, was dismissed.

Now, therefore, if the said American Steel & Wire Company shall prosecute said writ of error to effect, or if they fail to make good their plea, shall pay all costs and damages which may be adjudged against the American Steel & Wire Company, and moreover shall abide and perform the judgments and decrees of the Supreme Court of the United States, then this obligation to be void; otherwise to remain in full force and effect.

In testimony whereof we have hereunto set our hands and seals, this 8th day of June, 1903.

AMERICAN STEEL & WIRE COMPANY,
By PATTERSON, NEELY & HENDERSON, *Att'ys.*
BEN. R. HENDERSON.
S. M. NEELY.

Approved 11th day of June, 1903.

WILLIAM D. BEARD,
Chief Justice.

275

Citation.

AMERICAN STEEL & WIRE COMPANY, Appellee,
vs.
R. A. SPEED, Clerk of the County Court of Shelby County, Appellant.
} No. 31, Shelby Chancery Docket.

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington in the District of Columbia, on the 2nd Monday of October A. D., 1903, pursuant to an appeal and writ of error filed in the clerk's office of the supreme court of the State of Tennessee, sitting at Jackson, Tennessee, for the western division of said State, at its April term, 1903, and taken and issued to the said supreme court in the above entitled cause, wherein American Steel & Wire Company is appellee in error, and you are defendant in error, to show cause why the judgment in said appeal and writ of error mentioned and rendered in said cause by said supreme court against it should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William D. Beard, chief justice of the supreme court of Tennessee, this 12th day of June, 1903.

W. D. BEARD,
Chief Justice of the Supreme Court of Tennessee.

Service of citation acknowledged, this 13th June, 1903.

CHARLES T. CATES, JR., *Att'y Gen'l,*
W. H. CARROLL,
Attorneys for Appellant.

Filed June 13, 1903.

JNO. W. BUFORD, *Clk.*

276 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

AMERICAN STEEL & WIRE COMPANY, Appellee, *vs.* R. A. SPEED, Clerk of the County Court of Shelby County, Appellant. } No. 31, Shelby Chancery Docket.

The President of the United States to the honorable judges of the supreme court of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Tennessee, sitting at Jackson, Tennessee, for the western division of said State, in said district, before you, or some of you, at the April term, A. D., 1903, of said supreme court, being the highest court of law or equity in said State of Tennessee in which a decision could be had in a suit between American Steel & Wire Company, as complainant and plaintiff, and R. A. Speed, as clerk of the county court of Shelby county, Tennessee, as defendant, wherein was drawn in question the validity of a certain back assessment of the property of complainant, American Steel & Wire Company, situated in Shelby county, Tennessee, for the years 1901 and 1902, whereby the property of complainant was, for the purposes of taxation, assessed for the year 1901 at a valuation of $72,326, and for the year 1902, at a valuation of $166,275, and wherein complainant sought to recover the sum of $1,031.44—the amount of taxes, costs, commissions and fees paid by complainant under protest to defendant, and

277 wherein in the pleadings it was alleged and contended by complainant, American Steel & Wire Company that the assessment and collection of said taxes, commissions, costs and fees, were null and void, because said assessment was in contravention of, and contrary to, article 1, section 8, sub-section 3 of the Constitution of the United States, which provides that "Congress shall

have power to regulate commerce with foreign nations, and among the several States, and among the Indian tribes;" and wherein the said supreme court of the State of Tennessee held and adjudicated that the said assessment, and the collection of said taxes, were not null and void, and on the contrary, were in all respects valid, and the contention of the complainant was denied, and its bill of complaint dismissed.

And in said decision a manifest error has happened, to the great damage of the American Steel & Wire Company, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, on the second Monday of October, A. D., 1903, next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid, being inspected, said Supreme Court may cause further to be done therein to correct those errors what, of right and acc-rding to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 11th day of June, A. D., 1903, and of our Independence, the one hundred and twenty-seventh year.

278 Issued 11th. June, 1903.

[SEAL.] JOHN B. CLOUGH,
Clerk United States Circuit Court for the Western District.
DAN. F. ELLIOTTE, *D. C.*

Approved and allowed.

W. D. BEARD,
Chief Justice of the Supreme Court of Tennessee.

Filed June 13, 1903.
JNO. W. BUFORD, *Cl'k.*

279 *Certificate of Clerk.*

STATE OF TENNESSEE:

I, John W. Buford, clerk of the supreme court of said State for the western division thereof, at Jackson, certify that the foregoing is a true, perfect, and complete copy of the record in the case of The American Steel & Wire Company *vs.* R. A. Speed, clerk, to wit: Record No. 31, Shelby county chancery docket, being all the orders, decrees, and opinion and the assignment of errors, statement of the case, and briefs of the plaintiff in error, and defendant, which com-

prises a full, true and perfect transcript of the case, as appears of record and now on file in my office.

I also certify that it is a true and perfect copy of the bond, writ of error, certificate and citation and the endorsements on the same, filed in my office for perfecting of the appeal or writ of error for the purpose of carrying the said case from the supreme court of Tennessee to the Supreme Court of the United States.

I also certify that W. D. Beard is the chief justice of the supreme court of Tennessee, and that that is the court of last resort in said State.

In testimony whereof, I have hereunto set my hand and affixed the seal of the court at office in the city of Jackson, on this the 26th day of June, 1903, and of the Independence of the United States the 127th year.

[Seal Supreme Court of Tennessee, Western Division, Jackson, Tenn.]

JNO. W. BUFORD,
Clerk Supreme Court of Tennessee.

280 The transcript fee in this case, American Steel & Wire Co. *vs.* R. A. Speed, cl'k, was paid by the American Steel & Wire Co., and amounted to $183.50.

[Seal Supreme Court of Tennessee, Western Division, Jackson, Tenn.]

JNO. W. BUFORD, *Cl'k.*

June 26th 1903.

Endorsed on cover: File No. 19,007. Tennessee supreme court. Term No. 356. The American Steel & Wire Company, plaintiff in error, *vs.* R. A. Speed, clerk of the county court of Shelby county. Filed July 13th, 1903.

FILE COPY. 27813

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JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 350

AMERICAN STEEL AND WIRE COMPANY,
Plaintiff in Error,
vs.
R. A. SPEED, Clerk of the County Court of Shelby County,
Defendant in Error.

Brief for Plaintiff in Error.

JOSIAH PATTERSON,
For Plaintiff in Error.

PATTERSON, NEELY & HENDERSON,
PAM, CALHOUN & GLENNON,
Of Counsel.

E. H. TROTT & CO., PRS. & LITHO. MEMPHIS

27814

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 356

AMERICAN STEEL AND WIRE COMPANY,
Plaintiff in Error,
vs.
R. A. SPEED, Clerk of the County Court of Shelby County,
Defendant in Error.

Statement, Assignments of Error, Brief and Argument for Plaintiff in Error.

STATEMENT.

A fair and comprehensive statement of the case will be found in the opinion of the Supreme Court of Tennessee (Record, p. 165). Its findings are as follows:

> "This suit was instituted in the Chancery Court of Shelby county to recover $1,031.44, a merchant's tax assessed against complainant by R. A. Speed, clerk of the County Court of that county, and which was paid by complainant under protest, on the 18th of October, 1902. The chancellor rendered a decree in favor of complainant, and the cause is now in this court on appeal of the defendant clerk.
>
> "The facts upon which the controversy arises are as follows:
>
> "Complainant is a corporation created under the laws of New Jersey. Its situs is in the State of New Jersey, and its principal business office is situated at Chicago, Ill. It is engaged in the manufacture of

nails, staples, barbed and smooth wire, at different points north of the Ohio river. None of its manufactories are situated in Tennessee, and all of its products consigned to Memphis are shipped from points beyond the limits of this State.

"Prior to the first of February, 1900, its manufactured products were sold and distributed throughout the Southwest from Louisville, Ky.; Memphis, Tenn.; Greenville, Vicksburg, and Natchez, Miss.; and New Orleans, La. About that time the Patterson Transfer Company, a corporation created under the laws of Tennessee, having its situs at Memphis, and doing business at Memphis, represented to appellee that Memphis was the most available point in the Southwest at which to mass and distribute its manufactured products to its customers in that section. At this time, and for many years prior thereto, the Patterson Transfer Company had been engaged in the business of transferring passengers and freights to and from the various depots at Memphis, and from the landings on the Mississippi river. Appellee entered into an arrangement with the Patterson Transfer Company, whereby said company was to receive its manufactured products at Memphis, assort them so as to separate the different kinds of nails, staples and wire, and then to deliver them, either to the jobbers at Memphis, or to the jobbers beyond the limits of Tennessee, over the various lines of railroads and steamboats running into Memphis, as directed by complainants.

"None of complainant's products are ever sold to the Patterson Transfer Company, or are by it sold to others, and neither its officers or employes have any knowledge whatever of the price at which goods are sold by complainant. Under the arrangement between them, the business of the Patterson Transfer Company, in connection with complainant's products, is confined to their transfer to the warehouses, their assortment in the warehouses, the keeping of them in storage, and their subsequent delivery to the customers of the complainant, under its general or special orders, as below indicated.

"The goods of complainant are manufactured at different points, and it is convenient and useful, from a business point of view, to mass them at some place

at which they can be assorted, and from which they can be distributed to complainant's customers. It is impracticable to assort the goods either at the river landing or at the railroad depots when they reach Memphis, and, in order to facilitate the work, the Patterson Transfer Company has rented three warehouses in which the goods are stored for the purpose of assortment and distribution, and for other purposes below indicated. These warehouses are rented exclusively for this purpose, and the manufactured products of complainant, and no other goods, are stored therein.

"The evidence further shows that, as a general rule, prior to the time the goods are shipped to Memphis, sales agents of the complainant canvass the Southwestern country, and make contracts exclusively with jobbers; and in each instance where a contract is made, it is embodied in writing, on a form prepared by complainant, in which is set down the amount of goods which constitutes the subject of the contract, and the time agreed upon within which they are to be delivered. The goods so contracted for are described as so many kegs of nails, so many kegs of staples, so many reels of barbed wire, or so many coils of smooth wire, according to the terms of the contract, in respect of the quantity agreed upon. But the contract does not specify the grade and quality of the goods desired. The grade and quality are left open, to be subsequently specified when the customer desires a delivery, as below stated. The customer can, when he makes his specification, select any grade of goods he desires, and, upon so selecting, they will be delivered to him, up to the quantity contracted for, within the time agreed upon, at prices contracted for applicable to the several grades. In fixing the price of its goods, the complainant always, except when necessary to lower prices in order to meet competition, figures in the freight on the goods.

"As above indicated, it is shown in the evidence that there are many different kinds of nails, as well as different kinds of barbed and smooth wire, and it is expressly stipulated in the contract that the customer shall have the privilege of specifying, during the life of the contract, the kind of wire, or kind of nails or

staples he desires delivered to him under the contract. These contracts also specify from sixty to ninety days as the time within which the products are to be delivered; and at any time during the period prescribed in the contract, the customer may designate the kind of goods he desires delivered under it.

"These contracts are made, usually, before the goods arrive at Memphis, their point of destination, and generally the contracts are made in advance of the production of the goods at the complainant's factory. Usually the sales agents of the complainant, not only in advance of the shipment of the goods, but in advance of their production, canvass the Southwestern country—in the manner above stated—visiting the various jobbers, ascertaining the amount of goods they will require within sixty or ninety days, and the contract is prepared to the purport above indicated, in which the complainant obligates itself to deliver, at the prices stated, as above mentioned, the amount of goods contracted for therein, and the customer agrees to receive and pay for that quantity, upon the goods being delivered to him after he shall have made, and according to, his specification, which he may make during the life of the contract; the customer reserving the right, in the face of the contract, to specify the exact grade or quality of goods he desires delivered under it. He does this after the making of the contract, and at any time he desires to do so, within the life of the contract, by writing out his specification showing precisely what grade of goods he desires, and forwards this specification to the office of complainant in Chicago, and then the goods, under an order from the Chicago office, addressed to the Patterson Transfer Company, at Memphis, are selected by the latter out of the mass of goods belonging to the complainant in the aforesaid warehouses in Memphis, and are shipped by the said Patterson Transfer Company to the customer who has signed the specification. This order from the complainant to the Patterson Transfer Company is effected through the agency of a copy of the specification, which is forwarded to the latter from the complainant's central office at Chicago, it being understood, according to the course of business between the two companies, that the Patterson Transfer

Company will select out of the mass of goods those set out in the specification, and will ship them to the customer whose name is signed to the specification, upon receiving such copy of the specification from the central office at Chicago.

"This method of transacting the business is modified in practice, insofar as the fulfillment of the contracts made with the jobbers at Memphis is concerned. For the convenience of the Memphis trade, complainant advises the Patterson Transfer Company of the names of its customers at Memphis, and that company is instructed to deliver the goods embraced in the contracts with the Memphis jobbers, in the following manner: The Memphis jobber makes out his specification in duplicate, and addresses a letter to complainant, as in any other case; but, instead of forwarding this letter and his specification directly to complainant, he delivers the letter to the Patterson Transfer Company, and the Patterson Transfer Company at once delivers the goods so specified, attaching the dray receipt to a copy of the specification, and forwards the specification, letter and dray receipt to the office of complainant in Chicago, and that office makes out an invoice and sends it directly to the jobber. Another variation is made in the course of the business, in favor of the Memphis jobber, to the following effect: Any jobber in Memphis who is a recognized customer of the complainant can, without any previous written contract, or other special agreement, make out a specification of the goods he desires, and hand this, in duplicate form, to the Patterson Transfer Company. Upon this being done it is the duty of the Patterson Transfer Company, under its general instructions from the complainant, to select out of the mass of goods in the warehouses, goods corresponding to those contained in the specification, and deliver them to such jobber, this delivery being usually made by the next day, or, at most, within two or three days. Other deliveries on specifications sent direct to the Chicago office, are not usually made within less than six or eight days, and sometimes a longer period is required. When the Patterson Transfer Company receives from Memphis jobbers the specifications which are the special subject of this paragraph,

one copy is kept by it, and the other copy is forwarded to the office at Chicago, where, upon its arrival and reception, the customer is charged with the goods specified, at current prices.

"The testimony shows that of the mass of goods kept on hand in Memphis, in the above mentioned warehouses, about ninety per cent. ultimately goes to jobbers who reside outside of Memphis, and beyond the limits of this State. The remaining ten per cent. goes to the Memphis jobbers in fulfillment of the general contracts previously referred to, pursuant to specifications thereunder made, and under specifications made without previous written contracts, the latter covering about two and one-half per cent. of all the goods kept on hand.

"No one but an agreed or recognized customer of the complainant can make out a specification, or have goods delivered from the storehouses of the Patterson Transfer Company; and no goods are ever delivered or distributed to any one by the Patterson Transfer Company except under the express directions of complainant, or under general directions given by complainant to the Patterson Transfer Company, in favor of recognized and approved customers of the complainant, whose names are furnished by it to the Patterson Transfer Company.

"The testimony further shows that the quantity of goods which the complainant keeps on hand at Memphis fluctuates considerably, owing to the state of trade from time to time. Sometimes the stock is as low in value as $30,000, and sometimes the complainant has on hand a stock of the value of more than $100,000.

"Some of the goods, a very small amount, are shipped to Memphis by rail. Nearly all of these goods which come to the hands of the Patterson Transfer Company from this complainant, are transported to Memphis on barges belonging to transportation companies, in which complainant has no interest, and which are engaged in the carrying trade. As a general rule, while the complainant endeavors to secure contracts covering its output before the goods are manufactured, yet it does not always do so; but, taking advantage of the seasons when there is a good

stage of water in the rivers, which must be used in floating its products from its mills to Memphis, it masses its goods at the latter point in anticipation of future sales.

"The testimony shows that when goods are shipped from complainant's mills, consigned to Memphis, the Patterson Transfer Company is notified by the Chicago office that a certain quantity of complainant's products were shipped at a certain time, on barges, to the port of Memphis. These barges are met at the river landing by the Patterson Transfer Company, which receives the goods, transfers them to its warehouses and assorts them. Then, from time to time, it ships the goods on specifications, as before explained. On receiving the goods they are credited to the complainant on the books of the Patterson Transfer Company, and, on being shipped out, they are charged on the same books to the complainant. When the goods reach Memphis they are always consigned to the complainant, in care of the Patterson Transfer Company.

"All the goods forwarded to Memphis are products of the factories of complainant. No part of them are ever purchased by it. Its sales agents are exclusively engaged in selling these products. They are produced by complainant beyond the limits of this State, and are made the subject of contracts by its sales agents throughout the Southwest, in the manner before explained. These sales agents report all contracts effected by them directly to the office in Chicago, whether made with the jobbers at Memphis, or elsewhere beyond the limits of this State. All invoices for goods, when sold by specifications in the manner above stated, are made out at the office at Chicago, and forwarded directly to the customer, in the manner and under the circumstances previously stated.

"Some of complainant's goods are produced at one factory and some at another, and, consequently, when a purchaser contracts for the delivery to him, within sixty or ninety days, of a certain number of packages, it frequently turns out that some of the goods desired are the product of one factory, and some of another, and it is, accordingly, most convenient in the conduct of complainant's business that goods from complainant's various factories should be massed at some point

where they can be dealt with in the manner before explained.

"Complainant's goods are put up in the following original packages: The nails and staples are put up in kegs, each keg weighing 100 pounds; the smooth wire in coils tied by wires, and each coil weighing 100 pounds; the barbed wire on reels, the wire on each reel weighing 100 pounds. Each package is separately and distinctly made up at the factories for convenience of transportation, and is, in this form, delivered to the common carriers. In this form they are delivered at the initial point of transportation. In this form they are transported in barges, or by railroad, to Memphis, and received by the Patterson Transfer Company. In this form they are assorted at the warehouses by the Patterson Transfer Company, and delivered by it to the complainant's customers at Memphis, under the circumstances previously stated, or to the various lines of steamboats and railroads running out of Memphis, consigned, under circumstances previously stated, to customers beyond the limits of Tennessee, and in this form they ultimately come to the hands of complainant's customers in such foreign States. Each package is separate and distinct in itself, and while no particular package is consigned to any special customer, each keg of nails and staples is marked so as to show exactly what the package contains, and each coil and reel of wire is marked with a tag showing what the coil or reel contains, and no package is ever changed in any particular from the time it leaves the factory until it ultimately reaches the hands of the customer.

"The testimony shows that Memphis has, within recent years become, by reason of its accessibility to railway and river transportation, a great distributing point; and it was selected as the basis of the operations which are the subject of the present controversy, by reason of these exceptional advantages.

"Other facts proven by the complainant are as follows: The testimony of Mr. Young, the tax assessor, shows that none of the cotton shipped into Memphis from the surrounding States, pays any tax whatever, and that the manufacturers of lumber in Memphis pay no tax on lumber made from logs which are produced from the soil of this State.

"There is also an agreement of counsel, to the effect that there are large iron deposits in Tennessee, and a number of furnaces in this State engaged in the manufacture of iron from the iron ore deposits in this State.

"The bill alleges, and the answer admits, that complainant was assessed by the defendant clerk as a merchant, and was required to pay to the State a merchant's tax for the years 1901 and 1902, amounting to $1,031.44. On appeal to the State Board of Equalizers, this assessment was affirmed, and, thereupon, within the time required by law, towit, on the 18th day of October, 1902, complainant paid these taxes under protest. This suit was instituted by complainant within the time prescribed by the statute, to recover the taxes so paid, on the ground that the assessment was illegal and void for the following reasons:

"1. Because complainant was never, at any time, a merchant doing business at Memphis.

"2. That the assessment was in violation of Article 1, Section 8, Subsection 3, of the Constitution of the United States, which empowers Congress 'to regulate commerce with foreign nations, and among the several States, and among the Indian tribes.'"

On these findings the Supreme Court of the State held that plaintiff in error was not engaged in interstate commerce, but was a merchant doing business at Memphis, and was rightly and legally assessed to pay a merchant's *ad valorem* tax, and also a merchant's privilege tax. The court entered a decree denying the contention of plaintiff in error, that the assessment and collection of said taxes were in contravention of Article 1, Section 8, Subsection 3, of the Constitution of the United States—reversing the decree of the chancellor and dismissing the bill. Thereupon, plaintiff in error prosecuted a writ of error to the Supreme Court of Tennessee, and, in this court, assigns errors as follow:

ASSIGNMENTS OF ERROR.

I.

THAT IN AND BY SAID DECREE, ENTERED IN THE SUPREME COURT OF TENNESSEE, SAID COURT PROCEEDED ERRONEOUSLY TO HOLD THAT SAID ASSESSMENT WAS NOT IN CONTRAVENTION OF ARTICLE 1, SECTION 8, SUBSECTION 3, OF THE CONSTITUTION OF THE UNITED STATES, WHICH PROVIDES THAT CONGRESS SHALL HAVE POWER "TO REGULATE COMMERCE WITH FOREIGN NATIONS, AND AMONG THE SEVERAL STATES, AND AMONG THE INDIAN TRIBES."

II.

THAT IN AND BY SAID DECREE, SO ENTERED BY THE SUPREME COURT OF TENNESSEE, SAID COURT PROCEEDED ERRONEOUSLY TO HOLD THAT THE GOODS OF PLAINTIFF IN ERROR WERE NOT THE SUBJECTS OF INTERSTATE COMMERCE, BECAUSE IMPORTED INTO TENNESSEE IN THE ORIGINAL PACKAGES OF COMMERCE, AND THERE OFFERED FOR SALE IN THE ORIGINAL PACKAGES.

III.

THAT IN AND BY SAID DECREE, SO ENTERED BY THE SUPREME COURT OF TENNESSEE, SAID COURT PROCEEDED ERRONEOUSLY TO HOLD THAT THE GOODS OF PLAINTIFF IN ERROR WERE NOT IN TRANSITU FROM THE INITIAL POINT OR POINTS OF TRANSPORTATION TO THE PLACE OR PLACES WHERE THEY WERE TO BE DELIVERED TO THE PURCHASERS FROM PLAINTIFF IN ERROR.

IV.

THAT IN AND BY SAID DECREE, SO ENTERED BY THE SUPREME COURT OF TENNESSEE, SAID COURT PROCEEDED ERRONEOUSLY TO HOLD THAT SAID ASSESSMENT DID NOT OPERATE

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TO DISCRIMINATE BETWEEN PLAINTIFF IN ERROR, A CITIZEN OF THE STATE OF NEW JERSEY, WHOSE GOODS WERE MANUFACTURED OUT OF THE PRODUCE OF OTHER STATES, BECAUSE OF THEIR FOREIGN ORIGIN, AND SIMILAR GOODS MANUFACTURED OUT OF THE PRODUCE OF TENNESSEE.

V.

THAT IN AND BY SAID DECREE, SO ENTERED BY THE SUPREME COURT OF TENNESSEE, SAID COURT PROCEEDED ERRONEOUSLY TO DENY THE CLAIM OF PLAINTIFF IN ERROR, THAT SAID ASSESSMENT AND THE COLLECTION OF SAID TAXES THEREUNDER WERE IN CONTRAVENTION OF THE CONSTITUTION OF THE UNITED STATES, AND TO HOLD THAT SAID ASSESSMENT WAS VALID, AND TO REVERSE THE DECREE OF THE CHANCELLOR, AND TO DISMISS THE BILL OF PLAINTIFF IN ERROR.

Local, Constitutional and Statutory Laws.

Preliminary to the discussion of the assignments of error, it is material to collate the local, constitutional and statutory laws in force in Tennessee, which are deemed pertinent to a discussion of the assignments of error.

While the method of taxing merchants is peculiar in Tennessee, the meaning of the term "merchant" in that State is not different from that given by the lexicographers, and the interpretation given to it by the courts in the administration of the general principles of commercial jurisprudence.

Section 28, Article 2, of the Constitution of Tennessee is as follows:

> "Sec. 28.—*Taxation, Merchants and Privileges.* All property, real, personal or mixed, shall be taxed, but the Legislature may except such as may be held by the State, by counties, cities or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational, and shall except one thousand dollars' worth of personal property in the hands of each taxpayer, and the direct product of the soil in the hands of the producer, and his immediate vendee. All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value, but the Legislature shall have power to tax merchants, peddlers and privileges, in such manner as they may from time to time direct. The portion of a merchant's capital used in the purchase of merchandise sold by him to non-residents and sent beyond the State, shall not be

taxed at a rate higher than the *ad valorem* tax on property. The Legislature shall have power to levy a tax upon incomes derived from stocks and bonds that are not taxed *ad valorem*. All male citizens of this State over the age of twenty-one years, except such persons as may be exempted by law on account of age or other infirmity, shall be liable to a poll tax of not less than fifty cents nor more than one dollar per annum. Nor shall any county or corporation levy a poll tax exceeding the amount levied by the State."

Section 3 of "An Act to provide revenue for State, county and municipal purposes," passed by the General Assembly of Tennessee, April 22, 1899, and approved April 24, 1899 (See Acts of 1899, page 1011), is as follows:

"Be it further enacted, That all merchants shall pay an *ad valorem* tax upon the average capital invested by them in their business of 50 cents on the $100, 35 cents of which shall be for State purposes, and 15 cents of which shall be for school purposes; and a privilege tax of 15 cents on each $100 worth of taxable property, 7½ cents of which shall be for school purposes, and 7½ cents for State purposes; Provided, That such privilege tax, without regard to the length of time they do business, shall in no case be less than $5, which $5 is to be paid when the license is taken out, and in case of those whose privilege tax amounts to more than $5, the $5 paid shall be a credit when the balance of the tax is paid; Provided further, That said $5 shall be equally divided between the State and counties."

Section 2 of the same act provides:

"* * * The imposition of a privilege tax under this act shall not be construed as a release or exemption from an *ad valorem* tax, unless otherwise expressly provided. Nor shall this act be construed as repealing any special act heretofore passed imposing a privilege tax."

Section 28 of "An Act to provide more just and equitable laws for the assessment and collection of revenue for State,

county and municipal purposes," etc., passed by the General Assembly of the State of Tennessee, April 21, 1899, and approved April 24, 1899 (See Acts of 1899, page 1107), is as follows:

> "Be it further enacted, That merchants shall pay an *ad valorem* tax upon the capital invested in their business equal to that levied on taxable property. The term 'merchants,' as used in this act, includes all persons, copartnerships, or corporations engaged in trading or dealing in any kind of goods, wares, merchandise, either on land or in steamboats, wharf boats or other craft stationed or plying in the waters of this State, and confectioners, whether such goods, wares or merchandise be kept on hand for sale, or the same be purchased and delivered for profit, as ordered.
>
> "(1) Persons, firms, companies or corporations engaged in the business of merchandising, other than such as are embraced in subsequent subsections of this section, shall be taxed as herein set out. Such persons, firms, companies or corporations shall, at the expiration of the period of the bond provided for in this act, file with the clerk of the County Court of the county, a statement, under oath, showing the amount of capital invested in business to be assessed for taxation, but under no circumstances shall the amount to be assessed be less than the value of the average amount of stock on hand during the preceding year, to be ascertained by adding together the value of the highest amount of stock on hand at any time during said year with the value of the lowest amount of stock on hand at any other time during said year, and dividing the same by two, said statement to be sworn to by such merchant, person, or head of such firm, company or corporation, in which he shall state that he has not reduced his stock for the purpose of escaping taxation at any time, and has fully, truly and correctly, without evasion or reservation, made return as required by law, and said average amount of stock, as sworn to by said merchant, person, firm, company or corporation, shall be deemed the taxable value of the capital of such merchant, person, firm, company or corporation, upon which he shall pay to the County Court

clerk the same tax as levied upon real estate and other property for State, county and municipal purposes. The word 'capital,' as used in this subsection, shall be construed so as to mean the average amount of stock on hand during the year in which it is offered for sale, the amount to be ascertained as provided in this section, but if the average stock on hand is less than the capital stock employed by said merchant, firm or corporation, he shall pay a tax on the capital stock. * * *."

It will be seen that the merchant's privilege tax, and the merchant's *ad valorem*, or property, tax, are separate and distinct taxes, and that the merchant's privilege tax has no application to merchandise purchased and sold beyond the limits of the State. This is the construction placed by the Supreme Court of the State on Section 28, Article 2, of the Constitution.

The Merchants of Memphis v. The City of Memphis, 9 Baxter 76.

Hence it was that as plaintiff in error sold only ten per cent. of its manufactured products consigned to Memphis to jobbers who were residents of Tennessee, and ninety per cent. to jobbers who were residents of other States, plaintiff in error was assessed to pay a property or *ad valorem* tax on the whole amount, and a privilege tax only on ten per cent. of the whole. (See Record, p. 11.)

The only other provisions of local law deemed pertinent have reference to the exemption of products manufactured from the produce of the State.

Section 30, Article 2, of the Constitution of the State, is as follows:

"No article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees."

Subsection 5 of Section 2, of the Assessment Law, exempts from taxation—

> "All growing crops of whatever nature or kind—the direct product of the soil of this State in the hands of the producer or his immediate vendee, and manufactured articles from the produce of this State in the hands of the manufacturer."
>
> See Acts 1899, p. 1084.

Section 23 of the Assessment Law provides as follows: (See Acts of 1899, p. 1100.)

> "* * * That all persons, copartners and joint stock companies engaged in the manufacture of any goods, wares, merchandise, or other articles of value, shall pay an *ad valorem* tax upon the actual cash value of the property, real, personal or mixed, which is used and held for the purpose of manufacturing, preparing, completing and finishing goods, wares and merchandise, and the articles in the manufacture of which the parties aforesaid shall be engaged; Provided, The value of articles manufactured from the produce of the State in the hands of the manufacturer shall be deducted in assessing the property."

It will be noted that there is a marked difference between the assessment of the merchant's tax in Tennessee, and the assessment of all other property. The merchant's tax is assessed by the County Court clerk, whereas, all other property, including the property of manufacturers, is assessed by the county assessor.

Section 5 of the Assessment Law provides as follows: (See Acts of 1899, p. 1085.)

> "Be it further enacted, That the basis of all assessments shall be as follows, towit:
>
> "(1) To assess the property to the person or persons owning or claiming to own the same, on the 10th day of January of the year for which the assessment is made, if known; if not, to unknown parties * * *."

"Each manufacturing corporation, either foreign or domestic, shall pay an *ad valorem* tax upon the actual cash value of its capital stock or corporate property, including its franchises, easements, incorporeal rights and privileges, and all other corporate property, which said value shall not be less than the actual cash value of both its shares of stock and its bonded debt, and which said value shall be computed by looking to and considering the market value, and if no market value, the actual value of such stocks and bonds; Provided, however, that the assessment or taxation of said corporate property or capital stock shall be in lieu of any assessment or taxation of the shares of stock, either to the corporation or to the owners thereof; Provided, also, that the assessed value of the corporate realty and tangible personal property otherwise assessed, and in the case of manufacturers, the value of the articles manufactured from the produce of the State in the hands of the manufacturer, shall, in making the assessment, be deducted from the value of the capital stock or corporate property * * *."

By reference to the Acts of 1901, and also of 1903, it will be seen that the sections from the Acts of 1899, incorporated herein, were carried forward in the subsequent revenue and assessment laws passed by the General Assembly of Tennessee, and were in force at the time the taxes in question were claimed to have accrued.

The Supreme Court of Tennessee has decided that Section 30, Article 2, of the Constitution of the State, exempts articles manufactured from the produce of the State from the payment of an *ad valorem* or property tax, but does not exempt the manufacturer engaged in selling articles manufactured from the produce of the State from the payment of a privilege tax.

Kurth v. State, 2 Pickle 134.

By reference to the assessment law passed by the General Assembly of Tennessee, April 6, 1881, and approved

April 7, 1881 (See Acts of 1881, p. 248), it will be seen that Section 16 of the Assessment Law of 1881, defining the term "merchants," is incorporated word for word into Section 28 of the Assessment Law of 1899, above set out.

In construing the Assessment Law of 1881, the Supreme Court of Tennessee, in the case of Taylor v. Vincent (12 Lea 282), said:

> "We have carefully considered the question, and our conclusion is that a manufacturer who sells articles manufactured by him, the articles being the product of the growth of the State, is not a dealer in such articles. * * * We hold that a dealer is correctly defined by the Supreme Court of Pennsylvania in the case of Commonwealth v. Campbell (9 Casey 386), as a middleman, between the manufacturer or the producer and the consumer; or, as said by Judge Black in Norris Bros. v. Commonwealth (3 Casey 495), 'a dealer, in the proper acceptation or sense of the word, is not one who buys to keep, or makes to sell, but one who buys to *sell again*. He stands immediately between the producer and the consumer, and depends for his profits not upon the labor he bestows on his commodities, but on the skill and foresight with which he watches the markets.' In other words, a manufacturer of an article from the raw material, though he sells the article thus manufactured in unbroken packages to dealers, is not a wholesale dealer under these revenue statutes."

BRIEF.

In considering how far this court is concluded by the decisions of the court of last resort in a State, plaintiff in error maintains that the following legal propositions are now so well established as to place them beyond the pale of legal controversy.

I.

Where the construction of the Constitution of the State or the statutory law of a State is involved, this court will follow the uniform decisions of the court of last resort in such State, and will adopt its interpretation, notwithstanding this court would have reached a different conclusion from an application of the principles of general jurisprudence.

Morley v. Lake Shore, etc., Ry. Co., 146 U. S. 162.
Miller v. Swann, 150 U. S. 132.
Baltimore Traction Co. v. Baltimore Belt R. R. Co., 151 U. S. 137.
Marchant v. Pennsylvania R. R. Co., 153 U. S. 380.
Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112.
Aberdeen Bank v. County of Chehalis, 166 U. S. 440.
Wilson v. North Carolina, 169 U. S. 586.
Bank v. Skelly, 1 Black 436.
Christy v. Pridgeon, 4 Wallace 196.

II.

Where the construction of a local statute is involved, and it appears that the court of last resort in the State, has, previously to the controversy, placed an interpretation

on such local statute different from the interpretation placed on it in the pending suit, then this court may adopt either one or the other construction, in accordance with its own opinion of the rules of general law which should govern the case.

Roberts v. Northern Pacific R. R. Co., 158 U. S. 1.

Wilson v. Ward Lbr. Co., 67 Fed. Rep. 674.

National Foundry and P. Wks. v. Oconto Water Co., 68 Fed. Rep. 1006.

Knox County v. Ninth Nat'l Bank, 147 U. S. 91.

Bartholomew v. City of Austin, U. S. App., 85 Fed. Rep. 359.

Jones v. Great Southern Fire Proof Co., 86 Fed. Rep. 370.

Louisville Trust Co. v. City of Cincinnati, 76 Fed. Rep. 296.

III.

Where the decision of a court of last resort in a State is adverse to some right claimed under the Constitution of the United States, or some law of Congress, and such decision does not involve the construction of the Constitution of such State, or any of its local laws or usages, but the claim of right is denied on the opinion of such State court as to the principles of general law applicable to the case, then such decision is not a precedent binding on this court, and the Federal questions presented will be determined by this court according to its own independent judgment of the principles of general jurisprudence involved in the controversy.

Boyce v. Tabb, 18 Wallace 546.

Olcott v. The Supervisors, 16 Wallace 678.

Swift v. Tyson, 16 Peters 1.

Willis v. Board of Commissioners, 86 Fed. Rep. 872.

Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co., 70 Fed. Rep. 201.

IV.

Where a party brings a case on writ of error to the court of last resort in a State, and claims that he has been deprived by the decision of such court of some right secured to him under the Constitution of the United States, then this court becomes the exclusive and final arbiter of such Federal question, and will, after giving the opinion of the State court respectful consideration, decide the case for itself, independently of any construction which such court of last resort may have placed on the Constitution, or local laws and usages of such State.

Scott v. McNeal, 154 U. S. 34.

Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112.

Louisville & Nashville R. R. Co. v. Palmes, 109 U. S. 244.

Central Trust Co. v. Citizens' Street Ry. Co., 82 Fed. Rep. 1.

State Bank of Ohio v. Knoop, 16 Howard 369.

COMMERCE "AMONG THE SEVERAL STATES."

Subsection 3, of Section 8, Article 1, of the Constitution of the United States, providing that Congress shall have power "to regulate commerce among the several States * * *," presents a problem of momentous and growing importance, in the solution of which this court has rendered many opinions affecting in a marked degree the welfare of the whole country. From the adjudicated cases plaintiff in error adduces the following propositions of law, which it maintains have met with the approval of the court:

I.

Subsection 3, Section 8, Article 1, of the Constitution of the United States, in its application to a subject which is "national in its character, and admits and requires uniformity of regulation affecting alike all the States," when properly construed, means that Congress alone has the power to provide such regulations as the exigencies of commerce may require, and the absence of any legislation on the subject is equivalent to a declaration by Congress that commerce, as to that subject, shall be free. The importation of goods from one State into another is a subject of national importance, affecting the welfare of the whole country, and, therefore, the absence of any law of Congress in respect to an article which is the subject of interstate commerce, operates as an affirmative declaration that the importation of that article shall be free of any regulation or restriction whatever by the State into which such article is imported.

Brown v. Houston, 114 U. S. 622.

Bowman v. Chicago & Northwestern Ry. Co., 125 U. S. 507.

Leisy v. Hardin, 135 U. S. 100.

Pittsburg & Southern Coal Co. v. Bates, 156 U. S. 577.

II.

Goods imported from one State into another are the subjects of interstate commerce, and in the absence of any law of Congress, they will remain under the protection of the Federal Constitution exempt from any regulation or interference on the part of the State into which they are imported, until the status of such goods is changed by mingling them with the general property of the State, and

thereby terminating their character as subjects of interstate commerce.

Brown v. Maryland, 12 Wheaton 436.
Leisy v. Hardin, 135 U. S. 100.
Lyng v. Michigan, 135 U. S. 161.

III.

The power to tax is the power to destroy, and, therefore, the taxation of the subjects of interstate commerce is a regulation of "commerce among the several States," inhibited by the Constitution.

Lyng v. Michigan, 135 U. S. 161.
Leloup v. Mobile, 127 U. S. 640.
Bowman v. Chicago & Northwestern Ry. Co., 125 U. S. 465.
Weston v. Charleston, 2 Peters 449.
Postal Tel. Co. v. Adams, 155 U. S. 688.

IV.

The constitutionality of a tax imposed by a State is not to be determined by the manner of its imposition, or the agency through which it is collected, but by the subject on which the tax is imposed. If the tax operates as a burden on a subject of interstate commerce, it is obnoxious to the Federal Constitution, without regard to its character or the method of its enforcement.

Telegraph Co. v. Texas, 105 U. S. 460.
Cook v. Pennsylvania, 97 U. S. 566.
State Freight Tax, 15 Wallace 232.
Bank Tax Case, 2 Wallace 200.
Bank of Commerce v. New York, 2 Black 620.

V.

As long as goods imported from one State into another remain in the original packages in which they were transported, they will continue the subjects of interstate commerce, and the owner of the goods, in the absence of any law of Congress, may sell them in the original packages in the State into which they are imported, without restriction, interference or regulation by such State.

Brown v. Maryland, 12 Wheaton 436.
Leisy v. Hardin, 135 U. S. 100.
Lyng v. Michigan, 135 U. S. 161.
May v. New Orleans, 178 U. S. 496.
Schollenberger v. Pennsylvania, 171 U. S. 1.
Pabst Brewing Co. v. Terre Haute, 98 Fed. Rep. 330.

VI.

The original package of commerce is a package, bundle or aggregation of goods put up for convenience of transportation into whatever covering or receptacle the importer may elect, and delivered by him to the carrier at the initial point of shipment, to be transported from one State into another; and where a number of smaller packages are, for convenience, placed within a larger package, or bound together in a bundle, such bundle or larger package will constitute the original package of commerce; and when the bundle is unbound, or the larger package opened, in order to expose the smaller packages for sale, the goods will become mingled with the general property of the State and cease to be subjects of interstate commerce.

May v. New Orleans, 178 U. S. 496.
Schollenberger v. Pennsylvania, 171 U. S. 1.
Leisy v. Hardin, 135 U. S. 100.

Sawrie v. State of Tennessee, 82 Fed. Rep. 615.
Keith v. The State, 10 L. R. A. 430.
McGregor v. Cone, 39 L. R. A. 484.
Guckenheimer v. Sellers, 81 Fed. Rep. 997.
Austin v. State, 17 Pickle (Tenn.) 563.

VII.

When goods designed for exportation from one State into another State start on their journey at the initial point of transportation, they at once become subjects of interstate commerce, and are protected by the Federal Constitution from any interference or regulation by any State through which they may pass, until they reach their ultimate destination, notwithstanding, on the way, they may be delayed for a reasonable time on account of inadequate means of transportation, or for reshipment, or assortment, or distribution, or on account of any accident, or any other cause which may supervene to prevent the goods going directly from the initial point of shipment to the point of destination.

Coe v. Errol, 116 U. S. 517.
The Daniel Ball, 10 Wallace 557.
Howe Machine Co. v. Gage, 10 Otto 676.
Diamond Match Co. v. Ontonagon, 188 U. S. 82.
Kelley v. Rhoads, 188 U. S. 1.
Caldwell v. North Carolina, 187 U. S. 622.
State v. Engle, Receiver, 5 Vroom (N. J.) 425.
State v. Carrigan, 10 Vroom (N. J.) 35.
Passenger Cases, 7 Howard 405.
Head Money Cases, 112 U. S. 580.
New York v. Compagnie, 107 U. S. 59.

VIII.

As the absence of legislation on the part of Congress is equivalent to a positive declaration that interstate commerce shall be free, it follows that its subjects may be transported from one State into another, and there sold in the original packages, without the imposition of burdens of any kind, and that the imposition of a tax on such subjects by the State into which they are imported, cannot be justified or upheld on the ground that the tax is equal and applies impartially to all goods of like character within the limits of such State.

Robbins v. Shelby County Taxing Dist., 120 U. S. 489.

Leloup v. The Port of Mobile, 127 U. S. 640.

Asher v. Texas, 128 U. S. 129.

Stockard v. Morgan, 185 U. S. 27.

IX.

When goods imported from one State into another, whether in the original packages of commerce or not, are, by the State into which they are imported, made subjects of an invidious and discriminating tax, because of their foreign origin, the Federal Constitution will intervene to protect them from such invidious or discriminating tax, and its protection will continue as long as the goods can be identified, and the invidious discrimination exists.

Welton v. The State of Missouri, 91 U. S. 275.

Brown v. Maryland, 12 Wheaton 436.

Woodruff v. Parham, 8 Wallace 123.

State Freight Tax, 15 Wallace 232.

Minneapolis Brewing Co. v. McGillivray, 104 Fed. Rep. 258.

ARGUMENT.

THE CHARACTER OF THE ASSESSMENT, AND ITS RELATION TO THE FEDERAL QUESTIONS PRESENTED BY THE ASSIGNMENTS OF ERROR.

Whether plaintiff in error is a manufacturer or a merchant is immaterial, as an independent proposition, to the discussion in this court. If no Federal question is presented in the record, then the decision of the Supreme Court of the State, however erroneous, is conclusive. But, insofar as it may be necessary to determine the occupation of plaintiff in error, in order to reach a correct solution of the Federal questions involved, the inquiry is pertinent. The contention of the defendant in error is, that as the Supreme Court of the State has adjudicated that plaintiff in error was a *"merchant"* doing business at Memphis, this court is concluded by the decision, and must, in the disposition of the Federal questions presented, proceed in its deliberations on the assumption that plaintiff in error is a *"merchant,"* and not a manufacturer, however erroneous this court might regard the decision, if it was not precluded from reaching a different result.

In answer to this contention, plaintiff in error insists that this court is unrestricted, by Section 34 of the Judiciary Act, from an independent inquiry into the character of its occupation, and this court will determine for itself whether plaintiff in error be a merchant or manufacturer.

First: As far back as 1844, the Supreme Court of Tennessee, in the case of The State v. Smith (5 Hump. 394),

had occasion to define the term *"merchant,"* and, quoting with approval the definintion given in Tomlin's Law Dictionary, added, "from this definition it seems the business of buying and selling should be the pursuit and vocation of a party by which he makes his living, in order that he should be regarded as a merchant."

Section 28, of the Assessment Law of 1899, defining the term *"merchant"* to mean "one engaged in trading or dealing in any kind of goods, wares and merchandise," was embodied word for word in every assessment law passed by the General Assembly of the State for twenty years preceding the act of 1899. The Supreme Court, in Taylor v. Vincent (12 Lea 282), adopted the language of the Supreme Court of Pennsylvania in Norris Bros. v. Commonwealth (3 Casey 49), and held that a "dealer is not one who buys to keep, or makes to sell, but one who buys to sell again." So we have the Supreme Court of Tennessee, in 1844, defining a *"merchant"* to be "one engaged in the business of buying and selling;" in 1881, and since that time down to the present, we have Section 28 of the Acts of 1899, embodied in every assessment law of the State, defining a *"merchant"* to be *"one engaged in trading or dealing in any kind of goods, wares and merchandise,"* and, lastly, in 1883, after Section 28 became law, we have the decision of the Supreme Court, in Taylor v. Vincent, defining a *"dealer"* to be *"one who buys to sell again."* These definitions are all synonymous, and the exact definition given by the lexicographers. For the first time in the judicial history of the State, the Supreme Court, in this case, has decided that a manufacturer who sells his manufactured products thereby becomes a merchant. It was held in Kurth v. The State (2 Pickle 134), that a manufacturer engaged in sell-

ing his manufactured products might be required to pay a privilege tax on the *"occupation of selling;"* but nowhere, prior to the decision in this case, did it ever decide or intimate that a manufacturer engaged in selling his products was a merchant, and liable to pay an *ad valorem* merchant's tax.

When, in 1900, plaintiff in error selected Memphis as the point for the distribution of its goods in the Southwest, it had the right to assume that the Supreme Court of the State would adhere to the correctness of its adjudications, and now that it has, in this case, decided otherwise, it is confidently insisted that this court is not concluded by the later decision in this cause, but will follow the former decisions, if found to be in accord with its independent judgment.

In this connection it is appropriate to call attention to the difference between an *ad valorem* or property tax assessed against merchants, and an *ad valorem* or property tax assessed against manufacturers.

Section 28, of the Acts of 1899, provides for the assessment of the merchant's property tax, and another section, not copied, requires the clerk of the County Court to make the assessment, whereas Section 23 of the same act provides for the assessment of the manufacturer's property tax, and another section, not copied, requires the county assessor to make the assessment. Section 5, of the Assessment Law of 1899, which is embodied in all of the assessment laws from 1881 down to the present time, provides that property shall be assessed—

> "to the person or persons owning or claiming to own the same on the 10th day of January of the year for which the assessment is made."

On page 57 of the record will be found a statement showing the amount of goods belonging to plaintiff in error stored in Memphis on the first day of each month since February, 1900. On the same page will be found the correspondence between plaintiff in error and the Patterson Transfer Company, showing that the arrangement was not entered into between the parties, under which the goods were first consigned to Memphis, until January 30, 1900. By reference to the receipt of the clerk given for the taxes paid under protest (Record, p. 11), it will be seen that the clerk, under Section 28, in making the assessment, added the highest and lowest valuations of property stored with the Patterson Transfer Company during the year, divided the sum by two, and thus arrived at the assessment on a valuation of $72,326. Assuming plaintiff in error to be a merchant, this assessment was proper; but, assuming it to be a manufacturer, it was grossly erroneous, because on the 10th day of January, 1900—the date on which the law requires the property of a manufacturer to be assessed—there was not one dollar's worth of property belonging to plaintiff in error in Tennessee on which an assessment could be made.

In the same way the clerk made an assessment for the year 1901, on a valuation of $166,275; but, on reference to the statement above referred to, it will be found by simple calculation that the entire property of plaintiff in error stored at Memphis on January 10, 1901, was only valued at $86,602.50.

It may not be material to the controversy to show this difference, but it illustrates the method of taxation, and the enterprise of a back tax assessor in Tennessee.

Second: The definition of the word *"merchant,"* being correctly given in the Tennessee statute—as the term is un-

derstood by lexicographers and law writers—is this court concluded by a definition wholly different given to it by the Supreme Court of the State, or will it decide for itself the meaning of the term? If the statute of the State accurately defines the word *"merchant,"* will this court follow the Supreme Court of the State when it decides that the statute, when properly construed, means a *manufacturer?*

It is insisted that this is simply a question of general law, and this court will determine it in accordance with its own ideas of commercial jurisprudence.

Third: Plaintiff in error insists that the manufacturer of goods in another State has the constitutional right to import them into Tennessee, there store them, and sell them in the original packages, and, until sold, they are the subjects of interstate commerce, and not subject to taxation. To this defendant in error replies, that whatever may be the rights of a manufacturer in such case, the exemption does not extend to a merchant who imports goods into Tennessee, places them in his general stock, and is engaged in selling them in the original packages, or otherwise, to the trade. Therefore, in determining the Federal question presented by the second assignment of error, it may be material to inquire whether plaintiff in error is a merchant or a manufacturer.

Fourth: Plaintiff in error again insists that it is largely engaged in the manufacture of nails, staples, barbed and smooth wire at various points in other States, and while its manufactured products were *in transitu* through Tennessee, and necessarily detained there for the purposes of assortment and distribution, they remained the subjects of interstate commerce, and were protected from taxation on the part of the State. To this defendant in error makes

answer, that it is true goods *in transitu* from one State to another are not subject to taxation; but that plaintiff is not a *manufacturer*. but a *merchant*, and, as a merchant, imported the goods, and their journey ended when they were placed in its stock of merchandise at Memphis, where it was doing business. Therefore, in the solution of the Federal question presented by the third assignment of error it is important to determine whether or not plaintiff was a *manufacturer* or a *merchant*.

Fifth: Again, plaintiff in error insists that if the goods imported by it into Tennessee from other States, consisting of nails, staples, barbed and smooth wire, had been manufactured in Tennessee out of the produce of that State, that they would have been exempt from taxation under Section 30, Article 2, of the Constitution of the State, which provides, "that no article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees," and that to tax the goods of plaintiff would be to impose a burden on them because of their foreign origin, and, for that reason, obnoxious to the Constitution of the United States. To this contention defendant in error replies, that the General Assembly of the State of Tennessee has enacted a law declaring that Section 30, of Article 2, of the Constitution, applies only to goods in the *"hands of the manufacturer,"* and that the Supreme Court of the State has repeatedly decided that such was the proper construction of that provision of the Constitution. So it is that the defendant in error is driven to the insistence that, at the time the assessment was made, the goods were no longer in the *hands* of plaintiff in error as a *manufacturer*, but had passed from the *hands* of plaintiff in error as *manufacturer* into the *hands* of plaintiff in error as *mer-*

chant, and hence were no longer exempt, but subject to pay both a merchant's *ad valorem* and a merchant's privilege tax. So it will be seen that, in deciding the Federal question presented by the fourth assignment of error, this court must necessarily determine for itself whether plaintiff in error owned the goods in the capacity of a merchant, or held them in its *"hands"* as a manufacturer.

Pertinent to this branch of the case we quote from the decision of this court in the recent case of Stockard v. Morgan (185 U. S., p. 37):

> "Although it is said in the opinion of the State court herein that the thing taxed is the occupation of merchandise brokerage, and not the business of those employing the brokers, yet we have seen from the cases already cited that when the tax is applied to an individual within the State selling the goods of his principal who is a non-resident of the State, it is, in effect, a tax upon interstate commerce, and that fact is not in anywise altered by calling the tax one upon the occupation of the individual residing within the State while acting as the agent of a non-resident principal. The tax remains one upon interstate commerce, under whatever name it may be designated."

We conclude that this court is absolutely unhampered and unrestricted in the exercise of its rightful jurisdiction for the protection of the citizen in his rights under the Constitution of the United States, and, to accomplish that end, it will brush aside all disguises and pretexts whatsoever, and whether the infraction is by the legislative, executive or judicial branch of the State government, it will proceed directly to inquire whether, in effect, the rights of the citizen under the Federal Constitution, have been violated, and if they have been, it will administer the appropriate relief.

The question, then, is: First, whether, in point of fact, the goods of plaintiff in error were the subjects of interstate commerce; and, second, whether the State levied and collected taxes on those goods over its protest. If the answer is in the affirmative, the case is with plaintiff in error; otherwise, it is not entitled to relief.

The first and fifth assignments of error are general in their application; but the second, third and fourth are specific, and present with exactitude the Federal questions involved in the discussion.

SECOND ASSIGNMENT OF ERROR.

THAT IN AND BY SAID DECREE, SO ENTERED BY THE SUPREME COURT OF TENNESSEE, SAID COURT PROCEEDED ERRONEOUSLY TO HOLD THAT THE GOODS OF PLAINTIFF IN ERROR WERE NOT THE SUBJECTS OF INTERSTATE COMMERCE, BECAUSE IMPORTED INTO TENNESSEE IN THE ORIGINAL PACKAGES OF COMMERCE, AND THERE OFFERED FOR SALE IN THE ORIGINAL PACKAGES.

The findings of fact by the Supreme Court of the State brings this case exactly within the rule laid down in Brown v. Maryland, Leisy v. Hardin, and Lyng v. Michigan, and other cases cited in the brief, and these cases must be overthrown in order to hold that the goods of plaintiff were not the subjects of interstate commerce, and were properly the subjects of taxation.

The goods, for convenience of transportation, were made up at the factories—the initial points of shipment—in the following packages, towit: The nails and staples in kegs, each weighing one hundred pounds; the smooth wire in coils tied by wire, and each coil weighing one hundred pounds, and the barbed wire on reels, each reel weighing

one hundred pounds. Each package was made up and shipped separately from every other package, and each was appropriately marked, showing exactly what it was. The goods were consigned to plaintiff in error at Memphis, remained the property of plaintiff in error at Memphis, and were there stored in the original packages, at the time of the assessment, in warehouses rented for that purpose, separately and apart from all other property in Tennessee.

Plaintiff in error can add nothing to the reasoning of this court in the cases cited in support of its insistence that goods thus shipped, received and stored in the original packages, were protected from taxation under Subsection 3, Section 8, Article 1, of the Federal Constitution, until they were sold in the original packages, and thereby mingled with the general mass of property in the State.

Defendant in error, in answer to the contention presented by the second assignment of error, insists that the rule relied on by plaintiff in error has reference to imports from foreign countries, and has no application to imports from a sister State, and that the rule applicable to this case is, that where goods are transported from one State into another, and there offered for sale, they may be taxed even in the original packages in which they were transported, provided the tax is uniformly and impartially assessed on all like property in the State, and in no case would the tax be obnoxious to Subsection 3, Section 8, Article 1, of the Federal Constitution, unless it was discriminating, and imposed because of the foreign origin of the goods. In support of this contention the following cases are relied on by plaintiff in error:

Woodruff v. Parham, 8 Wallace 123.

Hinson v. Lott, 8 Wallace 148.

Brown v. Houston, 114 U. S. 622.

Pittsburg & Southern Coal Co. v. Bates, 156 U. S. 577.

It is now insisted by plaintiff in error that insofar as these cases, or any of them, conflict with its contention set forth in its second assignment of error, they have been, by implication, at least, overruled.

First: It is true that the case of Brown v. Maryland had reference to goods imported from a foreign country, and the opinion of Chief Justice Marshall to the effect that the same rule was applicable to goods imported from a sister State might be considered *obiter dictum.* However, that opinion has since been repeatedly approved and adopted by this court, and especially in the cases of Leisy v. Hardin, and Lyng v. Michigan, in which Justice Miller, who delivered the opinion of the court in Woodruff v. Parham and Hinson v. Lott, concurred.

The rule as stated by Chief Justice Marshall has been so often recognized and adopted by the courts, Federal and State, throughout the country that it may now be considered as permanently established as a rule entering into the very life and wellbeing of interstate commerce.

Second: As the country develops, and the volume of interstate commerce increases, it becomes more and more apparent that the rule stated in Woodruff v. Parham and Hinson v. Lott, that all taxes levied on goods imported from other States were without constitutional objection, provided the taxes were uniform and equal, is no longer tenable. It was distinctly denied in Robbins v. Taxing District, Asher v. State, and Stockard v. Morgan. It is a coincidence that the Chief Justice, in delivering the opinion of the court in Lyng v. Michigan, advanced the

same cogent reasons for denying this rule as were given by Justice Nelson in delivering the dissenting opinion in Woodruff v. Parham, and yet Justice Miller, who delivered the opinion of the court in Woodruff v. Parham and Hinson v. Lott, more than twenty years thereafter, concurrred in the opinion delivered by the Chief Justice in Lyng v. Michigan.

When it is considered that the country now extends from Alaska to the Philippines, and from ocean to ocean—embracing all latitudes and altitudes, and all varieties of climate, soil and production—we can comprehend in some degree the scope of our domestic commerce, and the result which would follow if the rule laid down in Woodruff v. Parham and Hinson v. Lott was enforced by this court. Each State has its advantages and its limitations, and the prosperity of each depends, in a large measure, on selling to other States its surplus products, and buying from other States products which it does not produce sufficiently to meet its wants. This situation offers a powerful inducement for each State, if not restrained, to tax those products which it does not produce, or produces inadequately, and thereby attempt to derive its revenue by methods which would operate to relieve its own people from the burdens of taxation, and impose them on the people of other States. In this way most of the evils affecting domestic commerce prior to the adoption of the Constitution, would be revived, and the only escape from the disastrous consequences would be for the courts to inquire into the motive of each State in passing such laws, and to hold that, notwithstanding they were apparently equal and impartial, as matter of fact, they were discriminating, and, therefore, obnoxious to the Federal Constitution. It

is hardly necessary to add that such an inquiry would lead to interminable confusion, and is altogether impossible as a solution of the problem.

It is admitted that the correct rule was stated in Robbins v. Shelby County Taxing District, in which this court held that—

> *"interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State."*

Third: Again, this court has repeatedly held that silence on the part of Congress is equivalent to a declaration that interstate commerce shall be free. It has also repeatedly held that goods imported in the original packages of commerce from one State into another, were the subjects of interstate commerce, until they were sold in the original packages, and were thereby commingled with the general mass of property in the State into which they were imported. Assuming these propositions to be true, then it would be impossible for the other proposition to be true, that the State into which the goods were imported could tax the goods in the original packages, provided the law was uniform and equal—imposing a similar tax on like property throughout the State—because, in that case, the freedom of interstate commerce would not depend on the silence of Congress, but on the will of the taxing power in the several States.

Fourth: The cases of Brown v. Houston and Pittsburg & Southern Coal Co. v. Bates are not in conflict with Leisy v. Hardin and Lyng v. Michigan, and other cases cited in the brief. The rule applicable to the *original packages of commerce* was not involved in these cases, but

rather the rule applicable to goods *in transitu*. In both cases the court assumed the coal was not offered for sale in original packages, and held that it was no longer *in transitu*, and having been offered for sale in the open market, it was mingled with the property of Louisiana, and, therefore, subject to taxation.

The case of May v. New Orleans (178 U. S. 496), fairly illustrates the meaning and scope of the decisions referred to. In that case the box in which the goods were imported was held to be the original package, and not subject to taxation; but as soon as the original package was broken, and the smaller packages were taken out and offered for sale, then immediately the contents of the box became mingled with the property of the State, and were subject to taxation. Now, in Brown v. Houston and Pittsburg & Southern Coal Co. v. Bates, the barges in which the coal was shipped down the Ohio and Mississippi rivers belonged to the owners of the coal, and the owners of the coal did not offer for sale the barges containing the coal, but the *coal out of the barges*. Had the coal been packed and enclosed in the barges, and each barge properly identified as containing so much coal, then the barge would have been the original package of commerce, and the owner of the barges could have floated them to Louisiana, and there offered them for sale with their contents, and they would have been protected from taxation as subjcts of interstate commerce.

THIRD ASSIGNMENT OF ERROR.

THAT IN AND BY SAID DECREE, SO ENTERED BY THE SUPREME COURT OF TENNESSEE, SAID COURT PROCEEDED ERRONEOUSLY TO HOLD THAT THE GOODS OF PLAINTIFF IN ERROR WERE NOT IN TRANSITU FROM THE INITIAL POINT OR POINTS OF TRANSPORTATION TO THE PLACE OR PLACES WHERE THEY WERE TO BE DELIVERED TO THE PURCHASERS FROM PLAINTIFF IN ERROR.

The question for discussion presented by the third assignment of error is, whether, according to the findings of the court below, the goods were *in transitu* when the assessment was made. It is certain that the goods had all left the initial points of shipment, and that none of them had arrived at their destination when they were assessed; that it was the intention of plaintiff in error from the moment the goods left the initial points of shipment until they were ultimately delivered to the purchasers, they should remain in the hands of common carriers; that the goods were all practically sold before they reached Memphis, and nearly all of them before they were produced at the factories; that plaintiff in error had a number of mills, widely separated, engaged in the production of its goods; that it was necessary to assemble and assort these goods for distribution; that Memphis was the point chosen for the distribution; that the Patterson Transfer Company—a common carrier—was employed to receive the goods at Memphis, there assort them, and either deliver them on the orders of plaintiff in error to jobbers in Memphis, or jobbers doing business beyond the limits of Tennessee; that the Patterson Transfer Company, finding it inconvenient to assort the goods at the steamboat landings or

railroad depots, rented warehouses where they were temporarily stored until they could be assorted and distributed as plaintiff in error might direct; that the goods so sold were all embraced in various contracts of sale by which different jobbers agreed to buy the goods, subject to delivery in sixty or ninety days, and the goods were to be delivered in pursuance of specifications made out by the buyers on the orders of plaintiff in error; that the Patterson Transfer Company had no authority to sell the goods; knew nothing of the price at which they were sold; never held the goods out for sale, and never received payment therefor; but acted strictly within the scope of its business as a common carrier; that plaintiff in error never, at any time, held its goods out for sale at Memphis; that the goods consigned to Memphis, and assorted and distributed by the Patterson Transfer Company were not unreasonably delayed at Memphis, and never at any time beyond the life of the contracts under which they were to be delivered; that the goods, and no part of them, were purchased by plaintiff in error, but were all the products of its own factories, and that only ten per cent. of all the goods consigned to and assembled at Memphis, were distributed to jobbers in Memphis, and the remaining ninety per cent. were delivered to jobbers doing business beyond the limits of Tennessee. It is insisted that these facts bring the case clearly within the authorities cited in the brief.

The case of State v. Carrigan (10 Vroom (N. J. 35), is analogous to the one under discussion. In that case the Supreme Court of New Jersey held that coal mined in Pennsylvania and shipped to Port Johnson, and there stored in bins for reshipment to New York, was *in transitu*, and not subject to taxation.

The case of The State v. Engle (5 Vroom (N. J. 425), is even stronger. It seems that in that case coal had been shipped from Pennsylvania across the State of New Jersey to Elizabethport, where it was being assorted preparatory to reshipment to other points. The court said:

> "The power of the State to tax the subjects of commerce where their transit, for the purposes of commerce, has ceased, and they have become incorporated and mixed with the mass of property in the community, is well settled. But that a tax on property belonging to a citizen of another State, in its transit to market in other States, which is delayed within this State, not for the purposes of sale, but merely for separation and assortment, for the convenience of shipment to its destination, is a tax on commerce among the States, is too plain to require argument. It is not the mode in which the tax is imposed, nor the person against whom it is assessed that determines whether the taxation is within the power of the State. The situation of the property, and the effect of the imposition on the price of the articles as between the owner and the purchaser—citizens of other States—are the circumstances upon which the question must be decided."

FOURTH ASSIGNMENT OF ERROR.

THAT IN AND BY SAID DECREE, SO ENTERED BY THE SUPREME COURT OF TENNESSEE, SAID COURT PROCEEDED ERRONEOUSLY TO HOLD THAT SAID ASSESSMENT DID NOT OPERATE TO DISCRIMINATE BETWEEN PLAINTIFF IN ERROR, A CITIZEN OF THE STATE OF NEW JERSEY, WHOSE GOODS WERE MANUFACTURED OUT OF THE PRODUCE OF OTHER STATES, BECAUSE OF THEIR FOREIGN ORIGIN, AND SIMILAR GOODS MANUFACTURED OUT OF THE PRODUCE OF TENNESSEE.

Section 30, Article 2, of the Constitution of Tennessee, provides that "no article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees."

The Supreme Court of the State, in March, 1902, delivered an opinion in the case of Benedict et. al. v. Davidson County, reported in Volume 67 of the Southwestern Reporter, page 806, in which this provision of the Constitution is construed. The opinion was delivered by Justice Wilkes, and is as follows:

"This cause was heard upon demurrer in the court below. The demurrer was overruled, and the defendants have appealed to this court, and assigned errors.

"The defendants are the County of Davidson, the mayor and city council of Nashville, and Len K. Hart, trustee of Davidson county. The case, as made by the bill, is that Benedict Bros. are residents of Davidson county, and are now, and have been for twenty years past, manufacturers and dealers in lumber; their place of business being Nashville, Tenn. They are called upon by the tax assessors for a statement of personalty taxable in their hands on the 10th of January, 1900. They refused to list as taxable a quantity of logs and lumber which they had in their yards on that day, which lumber had been manufactured from logs cut from their own lands in the State of Tennessee, and from logs which had been bought by them from other persons owning lands in the State, and upon which the logs grew. Thereupon the tax assessors for the county and city assessed complainants as owning personalty consisting of lumber and logs to the amount of $18,000. The State tax was paid under protest by complainants, and the present suit is to recover back the tax thus paid for State purposes from the trustee, and to enjoin the collection of the taxes assessed for county and municipal purposes. It is claimed by complainants that the property thus assessed is exempt from taxation under Sections 28 and 30, of Article 2, of the Constitution of Tennessee. The assessment law in force at the time of this assessment is chapter 435 of the Acts of 1899, and by Section 2, Subsection 5, of the act it is provided that 'all growing crops of whatever nature or kind, the direct product of the soil of this State in the hands of the producer, or his immediate vendee, and

manufactured articles from the produce of this State, in the hands of the manufacturer, shall be exempt from taxation.' Section 28, of Article 2, of the Constitution of the State, contains the following words: 'All property—real, personal or mixed—shall be taxed; but the Legislature may except such as may be held by the State, by counties, cities or towns, and used exclusively for public or corporation purposes, and such as may be held or used for purposes purely religious, charitable, scientific, literary or educational, and shall except $1,000 worth of personal property in the hands of each taxpayer, and the direct product of the soil in the hands of the producer and his immediate vendee.' Section 30 of the same article is as follows: 'No article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees.' So far as these provisions relate to the direct product of the soil, in the hands of the producer and his immediate vendee, and to articles manufactured of the product of this State, they are mandatory and self-executing. Complainants claim exemption from taxation upon the property assessed under and by virtue of each of these provisions of the Constitution, as well as the terms of the Act of 1899. Without construing the language and provisions of Section 28, above set out, which we think not necessary in this case, we proceed to inquire whether the property thus assessed is exempt under the provisions of Section 30.

"It is difficult to give a correct definition of the terms 'articles manufactured of the produce of the State.' It is evident that they are not the same as the direct product of the soil in the hands of the producer or his immediate vendee. The direct product of the soil is necessarily, in every instance, the produce of the State, but it does not follow that the produce of the State is confined to the direct products of the soil. And while the direct product of the soil is necessarily embraced within the terms 'produce of the State,' it may not fall within the definition of 'an article manufactured of the produce of the State.' To illustrate: Wheat is a direct product of the soil, but it is not an article manufactured of the produce of the State. Flour made of wheat grown upon Tennessee soil is an article manufactured of the produce of

the State, but it is not a direct product of the soil, though manufactured out of the direct product of the soil. Wheat grown on Tennessee soil is exempt, under the provisions of Section 28, *supra*, while flour, manufactured of such wheat is not, but is exempt only under Section 30. It is worthy of note that the exception contained in Section 30, of 'articles manufactured of the produce of the State,' originated with the Constitution of 1796, and was brought forward into the Constitutions of 1834 and 1870 in substantially the same language, while the exemption in Section 28 of the direct products of the soil, in the hands of the producer or his immediate vendee, originated with, and is first found in, the Constitution of 1870. It is a fair inference that our Constituion makers of 1870 did not consider the terms as the equivalent of each other, and that they intended, by incorporating both provisions in the Constitution of 1870, to make an exemption under Section 28, which had not previously existed under Section 30. We are of opinion that the term 'produce of the State' is intended to embrace whatever is produced or grown in the State, or is the yield of the State, whether it be crops, or timber, or coal, or iron, or marble, or wool, or any other article which may be treated as produced or grown within the State from or on the soil, or may be found in the soil. It must be noted, however, that it is not 'the produce of the State' which is exempt under Section 30, but 'articles manufactured of such produce.' So that it becomes necessary to decide what is an article manufactured, within the sense of this provision. The ordinary definitions of the word 'manufactured' can aid us but little. There will be no dispute but that an article (for example, a piece of furniture), when reduced to its finished state, as a table, would, in the hands of the manufacturer, come under the head of a 'manufactured article,' after it has gone through the many stages to reach that condition. And the troublesome question is, When did it become manufactured? Originally the tree out of which the material came was growing in the forest. This tree, with saw or ax, was felled to the ground. Next it was cut into lengths or logs, and in that shape became a merchantable article. These were transported to the

mill and sawed into rough lumber. This rough lumber was afterwards ripped into desirable sizes and lengths. Then the material went through a planing or smoothing process; then a process of adjusting or jointing the pieces one to another; then a process of being fastened in shape; next a polishing process—it may be, an oil or varnish finish, and other manipulations known to the trade for converting the crude material into handsome and useful shapes and appearances, ultimately designed as 'furniture,' and all these different processes may have been conducted by different parties. Now, at what stage of this process does the article become exempt as a manufactured article? Evidently the purpose of the exemption is to encourage manufacturing, and the pertinent question is, shall a construction be placed upon the clause which virtually says that, when the last finishing strokes have been put upon the article, it becomes exempt in the hands of the manufacturer, and not until then, or shall we say the exemption begins when the first act of manufacturing is done, or at some intermediate stage? Did the makers of the Constitution mean to say to the manufacturer: 'Your product shall be exempt in your hands if by your good fortune it can reach the finished stage, but, if by my good fortune and the aid of my machinery, I can catch the material in any intermediate stage between the log and the table, you must pay taxes upon it. In other words, you, the manufacturer, and you, the tax gatherer, shall start on equal terms when the log is placed on the yard of the mill manufacturer. It must then be a race of diligence between you from that time to the time the table is finished and ready for market. If you, the manufacturer, can by any means, open or secret, convert the log into the table before the tax gatherer catches you, then it is exempt; otherwise, it is not.' We cannot think this is a correct view. The process of manufacturing begins at least when the log is on the yard for the purpose of being sawed. When it is sawed into rough lumber, and when that is ripped into sizes and lengths, and when these are fastened together, and fitted one piece to another, and when the article is being polished, glazed, rubbed, or varnished —in all the stages from the time the log is on the yard until it appears finished by the manufacturer—the ex-

emption attaches and continues. Rough lumber and logs are articles of commerce, and for many purposes they are, in this condition, finished, and are not intended to be further manipulated; and so, also, is lumber which has been ripped into lengths or dressed for use. Logs are used in house or bridge building without further change. The exact question in this case is whether logs, in the hands of the mill-operating manufacturer, and the lumber, when cut by him into larger or smaller shapes and pieces, are exempt. We are not dealing with a condition where the owner of the tree has felled it, and cut it into lengths to be shipped to a foreign market and sold as logs; nor, on the other hand, are we dealing with the case of the same owner who may have felled his trees, and cut them into lengths in the forest, with a view of hauling them to his own mill, and then converting them by sawing them into lumber. Neither of these cases is presented. But we have the case of logs upon the yard of the sawyer or mill-operating manufacturer, ready to be sawed and lumber upon the yard already sawed. Nor are we dealing with the question of the taxability of the finished article after it has left the hands of the manufacturer and gone into the hands of the dealer or consumer. We express no opinion as to the application of the constitutional exemption to any of these conditions, as they are not involved in the present case. We do not consider the cases cited from California in point, as they turn upon different facts and different constitutional provisions, nor do we find any other authorities in conflict with this holding.

"We are of opinion that, under the facts in this record, the logs upon the yard, in the hands of the mill-operating manufacturer and his property, and lumber, rough and smooth, cut by him from such logs grown on Tennessee soil, are articles manufactured from the produce of the State, and exempt, under the provision of Section 30, Article 2, of the Constitution; and the demurrer was therefore properly overruled, and complainants, under the allegations of their bill, are entitled to recover back the taxes paid the State, and to perpetually enjoin the taxes assessed by the county and city; and the decree of the court below is therefore affirmed, and the cause remanded at costs of defendant for the appeal."

The findings of the Supreme Court of the State in this case show there are iron mines in Tennessee, and that the soil of Tennessee produces largely the material out of which plaintiff in error manufactures its goods. It is very clear that, if plaintiff in error was located in Tennessee, and its nails, staples, barbed and smooth wire were manufactured in Tennessee from iron mined in Tennessee, they would be, under this provision of the Constitution, exempt from taxation. It is equally clear, under the authorities cited in the brief, that to tax the goods of plaintiff in error manufactured from iron mined in other States, would be a discriminating tax, and obnoxious to Subsection 3, Section 8, Article 1, of the Constitution of the United States.

It is absolutely conclusive, under the construction of this provision of the Constitution of the State by the Supreme Court of Tennessee, that the goods of plaintiff in error were assessed on account of their foreign origin, and that therefore the assessment is a nullity. The only possible escape from this conclusion is to hold that plaintiff in error was a *merchant*, and not a *manufacturer*, or that the goods had passed from its "hands" as *manufacturer* into its "hands" as *merchant*, and that therefore it was in no position to insist that the assessment operated as a discrimination, because at the time the assessment was made they were not in the hands of plaintiff in error as the manufacturer of the goods.

But even this impossible contention under the decision just quoted would not, if maintained, operate to make the tax otherwise than a discriminating one, because in that case Benedict Bros., according to the statement of the court, were not only manufacturers of, but *dealers* in, lumber. Hence, assuming that plaintiff in error was a dealer

in its products, and, therefore, a merchant, the same result would follow.

CONCLUSION.

No student of the subject presented for determination by the assignments of error in this case can turn from it without increased reverence for the wisdom of the men who framed the Constitution, and increased veneration for Chief Justice Marshall, its first great expounder. Under the adjudications of this court, the provision that "Congress shall have power * * * to regulate commerce among the several States * * *," has, in the progress of time become the keystone of the arch upon which the prosperity of the American people depends. It has, more than any other, cemented the Federal Union, and is the source from which has sprung our domestic commerce, which now exceeds in volume all the international trade of the world. Great commonwealths, teeming with an enlightened population, and all the blessings and advantages of an advanced civilization, have sprung up in the heart of the continent, because they have free access to the markets of other States, to the harbors on our coasts, and, thence, to the markets beyond the seas.

Tennessee, the State to the Supreme Court of which the writ of error in this case runs, is no exception. Extending nearly five hundred miles across the continent, its people are accustomed to boast of their resources in agriculture, timber, iron, coal, marble and copper. Yet it nowhere touches the coast, and its development and prosperity depend on its reaching, without let or hindrance, the markets in other States, and, through our open ports, the markets of the world.

While the Constitution denies to a State the right to regulate commerce, it gives the power expressly to Congress. In construing the Constitution to mean that the silence of Congress is equivalent to the *declaration that commerce among the States shall be free,* this court leaves the way open for congressional interference, if the public welfare requires it. So the silence of Congress is also equivalent to the acquiescence of the American people, and to an expression of their will, that interstate commerce shall remain free and untrammeled.

Thus it is seen that this court, in dealing with this vital problem, has so interpreted the Constitution as not to jeopardize the public welfare. The power to regulate is lodged in Congress, and if Congress makes a mistake it can recall it. But if this court, in its interpretation of the meaning of the Constitution, makes a ruling detrimental to the public welfare, it establishes a precedent which is irrevocable. So it was, in the case of Leisy v. Hardin, the court having found that the beer stored in the original packages at Keokuk was a subject of interstate commerce, denied to the State the power to regulate it. By the passage of what is known as the Wilson Act, Congress so regulated the subject as to authorize the States to exercise the power denied by this court. If this act results harmfully, Congress can repeal it; but if this court had held otherwise the only way to correct the mistake would be for the court to reverse its ruling, or for the Constitution to be amended. This court has held that, in the absence of congressional action, commerce among the several States shall be free, and goods transported from one State into another, while in the original packages and until sold in the original packages, shall remain subjects of interstate commerce. Congress can in-

terpose, and, if it will, pass an act declaring that goods so imported from one State into another shall be subject to taxation in the original packages, provided the tax is uniformly and impartially imposed on all goods of like character in the State. Should Congress pass such an act, it could, at any time, recall or repeal it—the public welfare requiring it; but, if this court should so hold, its ruling would conclude Congress, no matter how disastrous to the public welfare the result might be.

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Of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 356.

AMERICAN STEEL AND WIRE COMPANY, PLAINTIFF IN ERROR,

vs.

R. A. SPEED, CLERK OF THE COUNTY COURT OF SHELBY COUNTY, DEFENDANT IN ERROR.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

AS TO STATEMENT OF CASE.

Counsel for plaintiff in error accepted the statement of the case made by the State supreme court in its entirety as true. No part of the findings of fact by the court was omitted and the statement by the Attorney General, in his brief, that "material facts found by said court" were ignored is not supported by the record (R., pages 165–174). It is true this court will accept the facts as found by the court below and will only consider questions of law arising from its findings. Not so, however, with the conclusions of the court

below, drawn from the facts. If this court was bound by the conclusions reached by that court, it would be futile for the citizen to claim protection under the Constitution of the United States, for no instance can be found where a State supreme court did otherwise than conclude its decision was not in violation of that instrument.

The facts being ascertained, it is for this court to determine, as matter of law, whether plaintiff in error was or was not a merchant, or whether the goods were *in transitu*, or whether the property of plaintiff in error became commingled with the general mass of property in Tennessee, or whether there was a discrimination against plaintiff in error because of the foreign origin of its goods, or whether the assessment against plaintiff in error was or was not in violation of article 1, section 8, subsection 3, of the Constitution of the United States. The Attorney General has simply confused the questions of law and fact and reached the result that this court will not only accept as true the findings of the court below, but will accept its conclusions from the facts as equally obligatory. Suppose from the ascertained facts the supreme court of Tennessee had decided that plaintiff in error was a common carrier, or wholesale dry-goods merchant, or a banker, then, according to the contention of the Attorney General, this court would, as matter of law, reach the same absurd conclusion; and he even goes to the extent of insisting that because the State board of equalization held plaintiff in error was a merchant, its conclusion is binding on all courts, and that, too, when the supreme court of the State has repeatedly held that the judgment of the State board of equalization was only conclusive as to values, and in support of this proposition we

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need not go farther than cite the cases of Grundy County *vs.* Tennessee Coal Company, 94 Tenn., 305, and Ward *vs.* Alsup, 100 Tennessee, 750, the two cases cited in his brief.

WAS PLAINTIFF IN ERROR A MERCHANT?

Nothing need be added to the brief of counsel for plaintiff in error on this subject, as all the statutes bearing on the subject are therein fully set out, together with the decisions of the supreme court of the State. It may confidently be asserted that prior to the decision of the supreme court of Tennessee in this case it has never held that a manufacturer was a merchant because he sold his manufactured products. The Attorney General places much reliance on the case of Kurth *vs.* State, 86 Tenn., 134, but when this case is considered it will be found that it does not sustain his contention. Article 2, section 30, of the State constitution provides that "no article manufactured out of the produce of this State shall be taxed otherwise than to pay inspection fees." As already shown in the brief for plaintiff in error, article 2, section 28, of the State constitution provides for an ad valorem tax on merchant's property, and also a privilege or occupation tax, but the privilege tax does not extend to goods sold beyond the limits of the State.

The supreme court of the State in the case of Merchants of Memphis *vs.* The City of Memphis, 9th Baxter, 76, in construing this section has drawn the distinction between a merchant's ad valorem and a merchant's privilege tax. One is a tax on property and the other is a tax on

the occupation. This rule is well understood in Tennessee. In the case now under discussion the clerk assessed an ad valorem tax on all the property of plaintiff in error and then a privilege or occupation tax on 10 per centum of its property, it being shown by the proof that the other 90 per centum was sold beyond the limits of the State (R., page 11). Now, in the case of Kurth *vs.* The State, above referred to, the supreme court of Tennessee held that article 2, section 30, had application to an ad valorem tax and did not apply to a privilege or occupation tax. Consequently a manufacturer of whiskey might be required to pay a dealer's license for selling his product in less quantities than a quart, but could not be required to pay an ad valorem tax; so if there is anything in the contention of the Attorney General it applies to only 10 per centum of the tax assessed against the plaintiff in error and not to the remaining 90 per centum, which was an ad valorem or property tax. It will be observed that the court in Kurth *vs.* State went very far in its interpretation of article 2, section 30, of the State constitution in order to prevent every manufacturer of intoxicating liquors from becoming a tippler. In the case of Taylor *vs.* Vincent, 80 Tenn., 382, the supreme court had held that a manufacturer of liquors might sell at his place of business his manufactured products in unbroken packages and was not liable to pay a tax as a dealer, but could claim exemption under said section. The only modification of this case is to be found in Kurth *vs.* The State, where it is held that where a manufacturer of intoxicating liquors from the produce of the State sells his products in less quantities than a quart, he thereby becomes a tippler or dealer and may be required to pay a license as such.

But there is another contention made by the Attorney General to which particular attention is invited. It is very plain that article 2, section 30, of the State constitution has reference to the manufactured product in the hands of the manufacturer, and does not apply where it has passed into the hands of some one else. It will be observed that the learned judge who delivered the opinion of the supreme court in this case inadvertently says: "The vital fact is that the goods were not sold from their place of manufacture." The Attorney General in his brief (page 9) says article 2, section 30, of the constitution of Tennessee has been before the supreme court of that State in a number of cases, and it has been uniformly decided that the exemption therein provided applies to the manufactured article in the hands of the manufacturer "*at his place of business*," and he italicises the words "*at his place of business.*" There is absolutely no warrant for this contention, except it was held, in Taylor vs. Vincent, that a manufacturer of liquors made of the produce of Tennessee, who held the same for sale in unbroken packages at his place of business, is not liable for the tax on dealers. The court in this case simply limited its decision to the exact facts presented, and because the goods happened to be sold in that case from the manufacturer's place of business by no means justifies the conclusion that if he had sold them elsewhere than at his place of business his products would have been subject to taxation. No other decision is cited in support of this contention, and in the nature of the case it cannot be maintained. On page 16 of the brief of plaintiff in error subsection 5 of section 2 of the assessment law is set out, which expressly provides that the exemption extends "to manufactured articles from

the produce of this State in the hands of the manufacturer," but nowhere does it say "at his place of business;" and if it had said so, it would have been a plain violation of the constitutional provision referred to. To hold that articles manufactured out of the produce of the State are only exempt as long as they remain at the manufacturer's place of business, but are taxable as soon as he sends them to market and offers them for sale, would render article 2, section 30, abortive as a provision to encourage manufactories in Tennessee.

WAS THE TAX DISCRIMINATORY?

The Attorney General seems to discredit the learned opinion of the supreme court of Tennessee in the case of Bennett *vs.* Davidson County, which is set out in full in the brief of counsel for plaintiff in error. He says the case has "never been officially reported." In this connection it would not be amiss to add that he is himself the reporter, and to suggest that perhaps the opinion has not met with his official approval. This case is conclusive of the discriminatory character of the assessment. The Attorney General fails in his effort to differentiate the case under discussion from that of Bennett *vs.* Davidson County. This court is asked to hold that plaintiff in error is a merchant and not a manufacturer simply because it sells its manufactured products, but in case this court decides otherwise it is urged to hold that the goods of plaintiff in error, when assessed, while notwithstanding they were in its "hands," were not at the time "at its place of business," and therefore were for that reason subject to taxation. The plain conclusion which must in-

evitably follow from the facts is that if these goods had been manufactured out of the produce of Tennessee they would have been exempt as long as they remained in the hands of the manufacturer, and this being true, it follows that a tax on goods of plaintiff in error, manufactured by it out of the produce of other States, as long as they are in its hands would be to require it to pay a discriminatory tax because of the foreign origin of its goods. This, at last, is the nature—the substance—of the transaction.

WERE THE GOODS IN TRANSITU?

The fact that two and a half per cent. of all of the goods shipped to Memphis for assortment and distribution were sold to particular customers, or that plaintiff in error availed itself of high water, at convenient seasons, in order to mass its goods at Memphis for distribution, does not alter the case. Substantially all the goods were sold before they reached Memphis, and the substance of the transaction was that the goods started on their journey from the manufactories of the plaintiff in error to be ultimately delivered at the end of their journey to customers who had purchased them, and during the journey they were never offered for sale, were never out of the hands of common carriers, and were only detained at Memphis for assortment and distribution to take place during the life of the contracts under which they were purchased. Stress is laid on the fact that no particular goods were sold to any particular customer; that the title of the goods remained in plaintiff in error until they were delivered, and they were insured by it. It is difficult to see how this could alter the case. Sup-

pose a manufacturer of flour in the Northwest should sell fifty thousand barrels of different grades to be delivered to various customers within ninety days throughout the Southwest, and this flour was assembled in a depot or warehouse at Memphis for assortment and distribution within the life of the contracts of sale. Would it be said that the flour so situated in the hands of a warehouseman and destined for delivery to the purchasers would not be *in transitu*, but, on the contrary, would be commingled with the property of Tennessee in such a way as to become subject to taxation? Would it alter the case to show that no particular barrel of flour was sold to any particular customer? Surely the flour in the case stated would be the subject of interstate commerce and under the protection of the Federal Constitution, and it presents a striking parallel to the case under discussion.

ORIGINAL PACKAGES.

There is no controversy in respect to the character of the packages in which the goods of plaintiff in error were shipped to Memphis and there stored, assorted, and distributed. The contention is that notwithstanding the goods were in the original packages of commerce they had come to a place of rest, had there been offered for sale and had become so mingled with the property of Tennessee as to render them no longer the subjects of interstate commerce and subject to taxation. The findings of the court below conclusively show that practically all these goods were sold before they reached Memphis; that they were not sent there for sale, but for assortment and distribution. The

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findings also conclusively show that in point of fact they were not held out for sale, and were not sold at Memphis. The findings also show that they were not commingled in any respect with the property of Tennessee, but, on the contrary, were stored, separately and apart from all other property, in warehouses rented for that purpose. It is deemed unnecessary to further dwell on the authorities cited in the brief of plaintiff in error. However, in this connection, it is proper to cite the latest deliverance of this court on this subject. In the recent case of The Norfolk and Western Railway Co. *et al.*, plaintiffs in error, *vs.* John R. Sims, sheriff, etc., this court made a ruling which would seem to remove this case from further doubt and controversy. It seems that a manufacturer of sewing machines at Chicago, Illinois, contracted to sell a sewing machine to a party in North Carolina, and the sewing machine was shipped to her to be delivered on the payment of the purchase-money. The title of the sewing machine until payment was made and the machine was delivered remained in the manufacturer just as the title of the goods of plaintiff in error remained in it when they were stored for assortment and distribution at Memphis. After holding that the title of the sewing machine remained in the manufacturer and the machine was the subject of interstate commerce until it was delivered to the purchaser, the court went on further and held that the machine was not subject to taxation because it was an original package of commerce. We quote the language of the court:

"Upon the other hand, for the past seventy-five years and ever since the original case of Brown *vs.* Maryland (12 Wheaton, 419), we have uniformly held that States have

no power to tax directly, or by license, upon the importer goods imported from foreign countries or other States while in their original packages or before they have become commingled with the general property of the State and lose their distinctive character as imports. In that case a law of Maryland required importers to take out a license before they could be permitted to sell their imported goods. That was declared to be void, not only as tax upon imports, but as an infringement upon the power of Congress to regulate commerce. The case is one of the most important ever decided by this court, and has been adhered to by a uniform series of decisions since that time."

The case under discussion falls exactly in this category. The title of the goods remained in plaintiff in error, an importer from another State; they were in the original packages of commerce; they were stored, separately and apart from all other property in Tennessee, in warehouses, and they were so stored, not for sale or to be offered for sale, but solely for the purpose of assortment and distribution. Surely it will not be said that the goods had "lost their distinctive character as imports." Assume that one or one thousand sewing machines had been shipped to North Carolina for sale, each machine having been shipped separately and apart from every other machine in the form of an original package of commerce, and all the machines were stored in a warehouse separately and apart from the other property in North Carolina and held there for assortment and delivery to purchasers in North Carolina, it is very clear that they would be the subjects of interstate commerce and not the subjects of taxation, and yet this is the precise case now presented to the court.

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It is, therefore, confidently submitted that in this aspect of the case the assessment was plainly a violation of the interstate-commerce clause of the Federal Constitution, and for that reason a nullity.

Respectfully submitted.

JOSIAH PATTERSON,
Counsel for Plaintiff in Error.

PATTERSON, NEELY & HENDERSON,
PAM, CALHOUN & GLENNON,
Of Counsel.

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Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

No. 356.

AMERICAN STEEL AND WIRE COMPANY,
Plaintiff in Error,

vs.

R. A. SPEED, CLERK, ETC.,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

CHARLES T. CATES, Jr.,
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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1903.

No. 356.

AMERICAN STEEL AND WIRE COMPANY,
Plaintiff in Error,
vs.
R. A. SPEED, CLERK, ETC.,
Defendant in Error,

Error to the Supreme Court of Tennessee.

May it please Your Honors:

The Supreme Court of Tennessee construing a statute of that State and applying it to the particular facts set out in the opinion of the court, adjudged that the plaintiff in error was liable for a "merchant's tax" upon the "average capital stock invested" in its business in Memphis, Tennessee, and, by writ of error, plaintiff in error seeks to have said judgment reviewed by this court.

The Statement of the Case

As made by plaintiff in error on its brief is correct to the extent of the quotations from the opinion of the Supreme Court of Tennessee, but because it *ignores many material facts* found by said court and which, in our opinion, are vital to the questions to be determined by this court, we respectfully call the attention of this court to the whole opinion of the Supreme Court of Tennessee in the

Record pp. 165-174.

Points Determined by the Supreme Court of Tennessee.

1. That plaintiff in error was engaged in business in Memphis, Tennessee, as a merchant dealing in staples, nails, wire, etc., within the sense and meaning of the statute defining and taxing merchants.

Record pp. 170-171.

2. That the goods belonging to plaintiff in error, stored in the warehouses in Memphis, and representing the "average capital invested" upon which the merchant's tax was assessed, were *not in transit* from one state to another as contended by plaintiff in error, but were assembled and at rest in said warehouses for the purpose of sale and to meet deliveries on sales made and to be made.

Record pp. 171-174.

3. That said goods were put up for sale in said warehouses in Memphis and were so dealt with by plaintiff in error as to make them part of the general mass of property in the State of Tennessee.

Record p. 174.

4. That the tax assessed against plaintiff in error as a merchant "dealing" in nails, wire, staples, etc., contained no element of discrimination against plaintiff in error as a foreign dealer, or otherwise.

Record p. 174.

5. That, upon the facts as found, the assessment of taxes against the plaintiff in error as a merchant was not in violation of Article 1, Section 8, sub-Section 3 of the Constitution of the United States which empowers Congress "to regulate commerce with foreign nations, and among the several states, and among the Indian tribes."

An examination of the assignment of errors and brief of plaintiff in error discloses that it seeks to have each and all of the questions decided by the Supreme Court of Tennessee, both of law and fact, reviewed by this court, but we respectfully submit that the judgment of the Supreme Court of Tennessee is final, conclusive and not reviewable by this court in respect of:

1. The questions of fact involved in said judgment.

Dower vs. Richards, 151 *U. S.*, 664.
In Re Buchanan, 158 *U. S.*, 36.

2. The interpretation, and application to the facts found, of the Constitution and Statutes of Tennessee as declared in said judgment.

Western Union Tel. Co. vs. Gottlieb, 190 *U. S.*, 425.
New York vs. Roberts, 171 *U. S.*, 661.

Therefore it follows that the judgment of the Supreme Court of Tennessee in respect to plaintiff in error being a dealer in nails, wire, staples, etc., in Memphis, Tennessee, and as such within the statute defining and taxing merchants, and that the tax in question was not discriminatory against plaintiff in error by reason of any provision of the constitution or statutes of Tennessee, or otherwise, is final and conclusive; but without in any way waiving our insistence that these questions are not open to inquiry in this court, we deem it proper, before adverting to the real and single inquiry presented on this record, to fully answer the plausible and ingenious argument advanced by the eminent counsel of plaintiff in error under the 1st and 4th assignments of error to the effect:

1. That plaintiff in error was not a merchant within the proper interpretation of the statute defining and taxing that business, and

2. That the tax in question was discriminatory against plaintiff in error as a foreign dealer in articles manufactured of the produce of other states by reason of the exemptions contained in the constitution and statutes of Tennessee in favor of articles manufactured from the produce of that State.

The holding of the Supreme Court of Tennessee on these questions adverse to the contention made on behalf of plaintiff in error was sound in law and abundantly supported by the facts, and treating the contentions of plaintiff in error in the order above stated, we respectfully submit:

FIRST.

That plaintiff in error was carrying on the business of a merchant, and as such properly assessed for taxes, within the sense and meaning of the Tennessee statute.

To avoid the force and effect of the construction placed by the Supreme Court of Tennessee upon the statute defining and taxing the business or occupation of a merchant the eminent counsel of plaintiff in error relies upon the definition of the term "merchant" as found in the opinion of the Supreme Court of Tennessee in the case of State vs. Smith (5th Hump., 394) decided in 1844, and insists that inasmuch as the Supreme Court of Tennessee, in the case just mentioned, placed an interpretation upon the term merchant different from the construction or meaning given that term in the pending suit, that this court may adopt either construction in accordance with its own opinion as to what should be decided or govern in this particular case. And to reinforce this contention it is further insisted on the brief of plaintiff in error that as late as 1883 the Supreme Court of Tennessee in Taylor vs. Vincent (12 Lea, 282) practically reaffirmed the definition of the term merchant as laid down in the *Smith* case, *supra*, wherein it was in effect held that a merchant or dealer is "one who buys to sell again."

It must be borne in mind however that in the *Smith* case the Supreme Court of Tennessee was considering a statute which used the term "merchant" without attempting to define it, and therefore recognized the definition which custom and usage had given to the word. In Taylor vs. Vincent, supra, the sole question decided by the court was that a manufacturer of liquors selling in unbroken packages *from his place of business* can not be taxed as

a dealer, and the quotation from the opinion of the court in that case as set out on the brief of plaintiff in error in respect to the definition of a dealer was pure *dicta* as is clearly shown in the opinion of the Supreme Court of Tennessee in Kurth vs. State (86 Tenn., 134-7) decided in 1887, where the court speaking through Mr. Justice Lurton said:

> "The case of Vincent vs. Taylor, 12 Lea, 282, is pressed upon us as determining that a dealer is one who buys to sell again. In this we do not concur. But this proposition is no part of the decision of the case, and was only used in argument by the judge in delivering the opinion of the court. The decision in that case only goes to the point of deciding that, under the revenue laws of 1881 and 1883, a manufacturer of liquors from the produce of this state, *who sold at his place of manufacture to dealers in unbroken packages*, was not a wholesale dealer within the meaning of those acts. *The Act of* 1885, *and the subsequent Act of* 1887, *define who are dealers within the meaning of these Acts, and this was doubtless done to meet the decision in the Taylor case.*"

And in the *Kurth* case it was distinctly and unequivocally held that even a manufacturer of liquors from the produce of the state, under the revenue statutes of 1885-1887 enlarging and making more comprehensive the definition of the term dealer or merchant, could not deal without paying the tax assessed against a dealer.

Thus it will be seen that the cases relied upon by plaintiff in error were decided under a statute which did not attempt to define the term merchant, but since these cases were decided, the General Assembly of Tennessee acting within its just authority has seen fit to declare that *all persons or corporations engaged in trade or dealing in any kind of goods, and whether the same be kept for sale or be purchased and offered for profit, are to be taxed as merchants.*

On his brief (p. 16) counsel for plaintiff in error refers to the Act of 1899, and while the Acts of 1899 and 1901, both of which

are involved, are substantially identical, we prefer to cite the Act of 1901, because this act is referred to in express terms in the opinion of the Supreme Court of Tennessee set out in the record.

The General Assembly of Tennessee (following the Acts of 1885, Ch. 1, Sec. 15 and of 1887, Ch. 2, Sec. 16, referred to by Mr. Justice Lurton, *supra*,) defined the term merchant as follows:

> "The term 'merchant' as used in this act includes all persons, co-partnerships, or corporations engaged in trading or *dealing* in any kind of goods, wares or merchandise, * * * *whether such goods, wares or merchandise be kept on hand for sale or the same be purchased and delivered for profit*, as ordered."
>
> *Acts of* 1901, *Ch.* 174, *Sec.* 27.

The Supreme Court found as a fact that plaintiff in error was "dealing" in nails, staples and wire in the City of Memphis at the time it was assessed for taxes and had been since February, 1900, and for a short time prior thereto, *and that said goods were not sold from their place of manufacture*, but were kept in stock at Memphis, and this stock drawn on from time to time to fill contracts of sale made by the company's salesmen, or to fill contracts made by means of the intending purchasers depositing specifications of goods desired, with the Patterson Transfer Company, and in that manner obtaining the goods. And further the court found that these goods were assembled in warehouses at Memphis and there exposed for sale, that deliveries were made therefrom to jobbers in Memphis as well as those residing in other states, and that the customers of plaintiff in error residing in Memphis could, when the goods desired by them were in stock, deposit their specification for the goods desired with the Patterson Transfer Co., and immediately on the same day obtain and have delivered to them the goods purchased.

Record pp. 170-173.

Upon these facts the Supreme Court of Tennessee held that plaintiff in error was a merchant within the sense and meaning of the aforesaid act of 1901, Ch. 174, Sec. 27.

Further it is not improper to call the attention of this court to the fact that after the assessment in question had been made against plaintiff in error by the County Court Clerk of Shelby County, the defendant in error here, the whole matter involving the status of plaintiff in error as a merchant and its liability to be assessed as such, was, on the appeal of plaintiff in error, laid before the State Board of Equalization where the assessment as made was in all respects affirmed, and by the express terms of the Acts of 1899 and 1901 it is provided: "The action of the State Board of Equalizers shall be final and conclusive as to all matters passed upon by the board and taxes shall be collected upon valuations so fixed and found by said board."

Record pp. 81-4.
Acts of 1901, *Ch.* 174, *Sec.* 38, *Sub-Sec.* 10.
Acts of 1899, *Ch.* 435, *Sec.* 39, *Sub-Sec.* 10.
Grundy County vs. Tenn. Coal Co., 94 *Tenn.*, 305.
Ward vs. Alsup, 100 *Tenn.*, 750.

SECOND.

The tax assessed against plaintiff in error as a merchant contains no element of discrimination against it as a foreign dealer, or otherwise.

The contention to the contrary made by the plaintiff in error under its fourth assignment (brief p. 42), is based upon its construction of Sec. 30, Article 2, of the Constitution of Tennessee, which provides that "no article manufactured of the produce of this state shall be taxed otherwise than to pay inspection fees," and what is referred to as an opinion delivered by Mr. Justice Wilkes in the case of Benedict vs. Davidson County, which however has never been officially reported and was not in fact filed for publication; but an examination of the opinion set out on pp. 43-48 of the brief discloses that the learned justice was dealing with the question of lumber in the hands of the manufacturer *at its place of business*, and that case is clearly distinguishable in its facts from the case at bar, as is made manifest by the exceptions stated on page 47 of the brief upon which it is expressly stated that no opinion is expressed with respect to the application of the constitutional

exemptions in question to the conditions noted in the exceptions, which were held not to be involved in that case.

The "merchant's tax" in Tennessee is *sui generis* and is strictly neither an *ad valorem* tax nor a privilege tax within the exact meaning of those terms, and while it partakes of the elements both of the *ad valorem* and privilege taxes, yet it is a tax laid "upon the average capital invested" in the business, and the General Assembly of Tennessee is given unrestricted power in the imposition of taxes on merchants, in that by Section 28 of Article 2 of the Constitution, it is provided that the "Legislature shall have power to tax merchants, peddlers and privileges in such manner as they may from time to time direct."

In the case of Oliver Finney Grocery Co. vs. Speed, Clerk, (87 Fed. Rep. 408) Judge Hammond, presiding in the Circuit Court for the Western District of Tennessee and entirely familiar with the revenue laws of that State, in passing upon the revenue act of 1897 (which is in substance the same as the Acts of 1899-1901 under consideration,) said, that it is perhaps a misnomer to refer to this merchant's tax as an *ad valorem* or strict privilege tax, and that the confusion arises out of the peculiar process provided in the act for levying the merchant's tax, in that while it is called both an ad valorem and a privilege tax, it is really an arbitrary tax levied upon the business of the merchant without any discrimination as to the character of the business in which he is engaged as between domestic and foreign or interstate goods or transactions."

Oliver Finney Grocery Co. vs. Speed, Clerk, 87 *Fed. Rep.* 409-412.

That it is not a strict ad valorem tax is conclusively shown by the provision in the revenue acts relating to the assessment of personal property to the effect that *"all personal property which is a part of the capital invested in the business of a merchant * * * shall not be assessed separately as personalty,* but shall be assessed as part of the capital, as provided in Section 8 of said Acts relating to the assessment of taxes against merchants."

Acts of 1899, *Ch.* 435, *Sec.* 8, *Class* 9.
Acts of 1901, *Ch.* 174, *Sec.* 8, *Class* 9.

The revenue acts in question provide that the *"average capital invested"* in the business of merchant shall be ascertained by adding together the highest and lowest amounts of stock on hand at any time during the year, and dividing that sum by two, but if the average stock on hand is less than the capital stock employed by the merchant he shall be taxed on the capital stock usually invested in the business.

Act of 1901, *Ch.* 174, *Sec.* 27.

Section 30 of Article 2 of the Constitution of Tennessee has been before the Supreme Court of that State in a number of cases and it has been uniformly decided that the exemption therein provided applies only to the *manufactured article* in the hands of the manufacturer *at his place* of business, and that it does not exempt goods or articles manufactured of the produce of the state, in the hands of the merchant or dealer, from the merchant's tax.

In the case of State vs. Crawford, McNeil & Co., 2 Head, 461, the Supreme Court of Tennessee construing Sec. 30, of Article 2 of the Constitution in connection with the provision of the constitution above quoted that the "Legislature shall have the power to tax merchants, peddlers and privileges in such manner as they may from time to time direct," said:

> "The power to tax merchants in such manner as they may think proper, is expressly given in Section 28, and they have 'directed' that the 'manner' shall be to settle the amount to be paid by the extent of their business, or the quantity of goods, wares and merchandise sold in each year, including things made or produced in this state. Is this prohibited by Section 30? We think not. This is not a tax upon the article, but the occupation of the merchant. There would have been no question if the old mode of taxing the occupation of the merchant a gross sum had been continued. But what difference can it make? The charge is only as to the 'manner' of settling the amount to be paid for the privilege. *It is not the article which is taxed, but the occupation or privilege.*"

In Kurth vs. State, 86 Tenn., 134, decided in 1887, it was held that even a manufacturer of liquors from the produce of the state can not sell without taking out license as a dealer.

The same principle is recognized by the Supreme Court of Tennessee in the case of Machine Co. vs. Gage, 9 Baxter, 518, which was brought to this court by writ of error to the Supreme Court of Tennessee and was affirmed.

Machine Co. vs. Gage, 100 *U. S.*, 676.

We will not further burden this Court with a discussion of the peculiar revenue laws of Tennessee but deem it proper to call the attention of the Court to the fact that in the Supreme Court of the State of Tennessee it was conceded for plaintiff in error that it could not claim any discrimination in the tax laws of the state in respect to the origin of its goods, if it was treated as a merchant because there is no discrimination between merchants in respect to the origin of goods. They are all taxed alike whether the goods representing the "average capital invested" be products of Tennessee or of other states, but the contention is now made by plaintiff in error that the tax laws of Tennessee under consideration operate to discriminate between the plaintiff in error, a citizen of New Jersey, because the goods of plaintiff in error were manufactured in states other than Tennessee. On this question, the Supreme Court of Tennessee, by Mr. Justice Neil, said in part:

> "Complainant concedes that such contention can be raised only against a direct tax, and there is no such tax involved in this case. The tax assessed must stand or fall as a merchant's tax. Hence the question of a discriminative tax which is not raised in this case need not be considered. The tax which is under consideration in the present case has no element of discrimination against the complainant as a foreign dealer or otherwise, and hence can not be objected to on that ground."

We repeat, that the construction of these revenue acts of Tennessee by the Supreme Court of that state is binding upon this

Court, and moreover by the well settled principles announced and enforced by this Court, said acts are in no sense discriminatory against plaintiff in error as a foreign dealer or its goods as articles manufactured in another state.

New York State vs. Roberts, 171 *U. S.*, 658-666.
Bell Gap R. R. Co. vs. Pa., 134, *U. S.*, 232.

THIRD.

The tax assessed against plaintiff in error as a merchant is not in violation of article I, Sec. 8, sub-Sec. 3, of the Constitution of the United States, which empowers Congress "to regulate commerce with foreign nations, and among the several States, and among the Indian tribes."

This is the only question open for consideration upon this record, if, indeed, the facts as found by the Supreme Court of Tennessee show that any federal question can be raised.

The contention made by plaintiff in error that it is protected from taxation on its business in Tennessee by the commerce clause of the federal constitution is based upon the following propositions:

1. Because the goods of plaintiff in error were imported into Tennessee in the original packages of commerce and there offered for sale in the original packages.

2nd assignment of error, brief p. 34.

2. That the goods of plaintiff in error from the time they were shipped from the factory until delivered to the purchaser, were *in transitu* and so can not be considered in an assessment of taxes.

3rd assignment of error, brief p. 40.

We shall consider these propositions in their inverse, but logical, order:

(a.) Were the goods of plaintiff in error in course of transit from one State to another or from the initial point of shipment to the purchaser at the time the tax was assessed?

In answer to this question the Supreme Court of Tennessee, in part, said:

> "We do not think that this position is well taken. Under the method of business pursued by complainant, these goods had been sold to no one, nor were they in course of transit for the purpose of being put directly upon the market. The warehouse of the Patterson Transfer Company was in the nature of a permanent place of deposit where complainant's goods were gathered together, and were left to await the orders of customers, and from the mass so created goods were from time to time drawn to meet the wants of customers, and as called for by them. It is true that an effort was generally made to get agreements from intending purchasers that they would take the output of complainant's mill before the goods were manufactured, and that usually enough of these contracts were in existence, and calling for a sufficient quantity of goods to cover the expected output of sixty or ninety days, the time during which these contracts usually ran; *but these contracts did not constitute sales.*"
>
> *Record pp.* 171-172.

Then the Supreme Court of Tennessee demonstrates that the so-called "contracts" or "orders" which plaintiff in error had taken from its many customers, and which were afterwards filled by delivery from the warehouse in Memphis, did not constitute sales, and there was in fact no sale until the customer had selected the goods desired by him and filed with plaintiff in error or its

warehouse in Memphis a *specification* describing the particular goods desired.

Further, the Supreme Court of Tennessee found as a fact that the goods were consigned to itself at Memphis and there insured by it in the warehouses wherein the goods were stored in an unmarked mass from which when its customers in Arkansas, Texas and other states in the southwest filed their specifications for the particular goods desired by them, goods of the kind and in the quantity specified were taken and shipped, and that this course was also pursued with respect to some of its customers in Memphis; but many of its recognized customers among the merchants of Memphis without the formality of any previous written "order" or "contract" were allowed to select or specify goods whenever they desired, and the Patterson Transfer Company would thereupon promptly deliver to such merchants the goods specified and without any previous notification to the office of plaintiff in error in Chicago or negotiations therewith: Further that the "goods kept on hand at Memphis, in the stock referred to, must be regarded as kept on hand for those purposes also."

Record p. 173.

Further, "it is important at this juncture to note, as shown in the statement of facts, that the fact last stated, is not the only evidence that the goods were not massed at Memphis merely for the purpose of meeting the general contracts above referred to, previously made in and throughout the Southwest; on the contrary as previously stated, it appears that complainant takes advantage of the stages of the water in the rivers over which it ships its goods in barges to float down large quantities of its goods, *in anticipation of sales* and to have them ready, against a time when the waters may be so low that shipments can not be made by that way, but only by the more expensive method of railroad transportation."

Record p. 173.

Upon these facts it is manifest that the goods were not in transit, but were at rest for sale in warehouses provided therefor

and where they might remain for a month or a year or even five years and until they were in fact sold to some customer of plaintiff in error, or until plaintiff in error desired to remove them elsewhere.

In support of the contention made by plaintiff in error that these goods when taxed were in course of commercial transit from the initial point of shipment to the point where the goods are delivered to a vendee and title passes out of plaintiff in error into the vendee, two New Jersey cases are cited.

State vs. Carrigan, 10 *Vroom*, 35.
State vs. Engel, 5 *Vroom*, 425.

On the brief of plaintiff in error it is stated that the last case is even stronger than the first.

For the purposes of this argument we accept what the New Jersey Court of Appeals in the *Engel* case laid down as the law: "The power of the state to tax the subjects of commerce where the transit, for the purposes of commerce, has ceased, and they have become incorporated and mixed with the mass of property in the community is well settled."

Applying this principle to the facts found by the Supreme Court of Tennessee it is manifest that the plaintiff in error was lawfully assessed upon the goods which it had shipped from its factory to itself in Memphis, where said goods were insured for its own benefit, and stored in warehouses for the purposes of sale and deliveries thereafter to be made.

In support of our contention we cite your honors to the following additional authorities.

Coe vs. Errol, 116 *U. S.*, 517.
Brown vs. Houston, 114 *U. S.*, 622.
Kelley vs. Rhodes, 39 *L. R. A.*, 594.

Having thus shown that plaintiff in error was not entitled to escape taxation by reason of its contention that its goods were

taxed when "in transit" from one state to another, we will next proceed to examine into its claim that the assessment against it was an unlawful interference with its rights under the commerce clause of the federal constitution, because it is claimed:

(b.) Its goods were imported into Tennessee in original packages of commerce and there offered for sale in the original packages.

Involved in this is squarely presented the contention that plaintiff in error which has paid no tax whatever upon its goods shipped to and stored in Memphis (Record p. 83) is not liable for taxation as a merchant upon the "average capital invested" in its business carried on by means of these goods, because said goods when sold and delivered from the warehouses, wherein they are stored, to the customers of plaintiff in error were the same packages as when shipped from the factory.

If this proposition can be maintained, then every wholesale merchant in Tennessee buying from a manufacturer or merchant in another state can escape taxation by simply continuing the goods purchased by him in their original packages and in such form sell and deliver said original packages to his customers.

Such is the legitimate and logical result of the proposition contended for by the learned counsel of plaintiff in error, who, with great ingenuity, argues that an original package of commerce is not a subject of taxation in the state to which it is shipped, sold and delivered, so long as it is the property of the shipper or person to whom it is consigned; in this case the shipper and the consignee are the same.

We respectfully submit that there has never been a decision of this court in the slightest degree tending to establish the proposition that goods shipped from one state into another and there put at rest in the latter state and made a constituent of the mass of property in the state in precisely the same manner as other property which is brought into a state for sale and lodged or stored in a warehouse, is not a proper subject for taxation so long as it

remains in the same package in which it was brought into the state and stored or lodged in the warehouse.

But in support of the contention made by plaintiff in error the following cases are relied on:

Brown vs. Maryland, 12 *Wheaton*, 436.
Leisy vs. Hardin, 135 *U. S.*, 100.
Lyng vs. Michigan, 135 *U. S.*, 161.

It is unnecessary to call the attention of this Court to the fact that in *Brown vs. Maryland, supra*, so often relied upon in every attempt to evade just and proper taxation and a due share of the burden which should be borne in consideration of the protection and safety afforded by the state to property within its borders, the principle question before this court for determination was not involved and not directly passed upon by the learned Chief Justice although the doctrine was expressly recognized that when an importer has so acted upon the articles imported that they become mixed up with the mass of the property of the state they lose their distinctive character, and become proper subjects of state taxation.

Leisy vs. Hardin, supra, is not an authority against the contention on behalf of Tennessee in this case, nor, is it difficult to understand the principles upon which that case was determined.

This court at its October term, 1890, *In Re Rahner*, 140 U. S., 545-559, by Mr. Chief Justice Fuller, said:

> "The laws of Iowa under consideration in *Bowman vs. Railway Company*, 125 U. S., 465, and *Leisy vs. Hardin*, 135 U. S., 100, were enacted in the exercise of the police power of the state, and not at all as regulations of commerce with foreign nations and among the states, but as they inhibited the receipt of an imported commodity, or its disposition before it had ceased to become an article of trade between one state and another, or another country and this, they amounted in effect to a regulation of such commerce."

Further, as stated by this court in *Plumlee vs. Massachusetts*, speaking through Mr. Justice Harlan, *Leisy vs. Hardin* must be restrained in its application to the case actually presented for determination.

155 *U. S.*, 474.

And we submit that there is a wide difference between inhibiting the reception of legitimate articles of commerce imported from one state into the borders of another state, or their sale upon arrival there in the form in which they were imported, and subjecting them to a non-discriminating tax after they are put at rest and mingled with the mass of property within the state.

Lyng vs. Michigan, supra, following the case of *Leisy vs. Hardin*, in which the opinion was also given by Mr. Chief Justice Fuller, involved a discriminating tax against the manufacturer of malt or brewed liquors made outside of the state of Michigan, and therefore was a tax on the occupation or business of selling brewed or malt liquors manufactured outside of the state of Michigan largely in excess of the tax upon the manufacturer of brewed or malt liquors in the state. The tax against the former being $300.00 per annum and against the latter $65.00 per annum.

There can be no question but that such a tax was a burden upon interstate commerce and amounted to a regulation of it, but upon the facts of that case we submit that the opinion of this court rendered therein amounted to no more than an affirmance of the principle that having the right under the commerce clause of the Federal Constitution to ship goods from another State into Michigan, the manufacturer or shipper had the right to sell his goods without the imposition thereon of any other or different burden than the ordinary burden of taxation upon like goods manufactured within the state.

Therefore we submit that *Leisy's* case was one of prohibition and *Lyng's* case one involving solely a discriminating tax; and that neither has any bearing upon a non-discriminating tax laid upon merchants whether foreign or domestic and measured by the

"average capital invested" in the business of such merchants to be ascertained in the manner provided in the Tennessee statute.

Ficklen vs. Shelby County, 145 *U. S.*, 21.

In order to avoid the force of the reasoning and effect of the application of the principles laid down by this court in the cases cited by the Supreme Court of Tennessee in support of its holdings, the eloquent counsel of plaintiff in error is forced to the contention that the rule laid down in *Woodruff vs. Parham*, 8th Wallace, 123, *Henson vs. Lott*, id. 148, *Brown vs. Houston*, 114 U. S., 622, and the other cases cited by the Supreme Court of Tennessee are no longer tenable and offers as cogent reason for such contention that the "country now extends from Alaska to the Philippines and from ocean to ocean, embracing all altitudes and latitudes, and all varieties of climate, soil and productions," on account of which the principles laid down in these well considered cases decided before we had acquired the Philippines and embraced all "altitudes" have become exceedingly old fashioned, obsolete and not applicable to the new order of things. But we submit that the reasons given by this court in announcing its conclusion in the cases above mentioned apply with increased force and vigor to the particular facts presented by this record for consideration by this court.

Upon principle this case can not be differentiated from the leading case of *Woodruff vs. Parham*, 8 Wallace, 123, where in the course of his opinion Mr. Justice Miller, said:

> "Whether we then look to the provision of the clause of the constitution in question or to its relations to other parts of that instrument, or to its office and adoption, or to the comments of the eminent men who took part in those transactions, we are forced to the conclusion that no intention existed to prohibit by this clause the right of one state to tax articles brought into it from another.
>
> "If we examine for a moment the results of an opposite doctrine, we shall be well satisfied with the wisdom of the constitution as thus construed:

"The merchant of Chicago who buys his goods in New York and sells at wholesale in the original package may have his millions employed in trade for half a lifetime and escape all state, county and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the state nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares or educate its children. The merchant in a town in Massachusetts who deals only in wholesale, if he purchase his goods in New York, is exempt from taxation. If his neighbor purchase in Boston, he must pay all the taxes which Massachusetts levies with equal justice on the property of all of its citizens.

"These cases are merely mentioned as illustrations. But it is obvious that if articles brought from one state into another are exempt from taxation, even under the limited circumstances laid down in the case of *Brown vs. Maryland*, the grossest injustice must prevail, and equality of public burdens in all our large cities is impossible."

The learned justice after reviewing all the cases upon which it was contended that the tax in question was violative of the commerce clause of the constitution said:

"The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales are made by citizens of Alabama or of another state, and whether the goods are the products of that state or some other."

The question, since the decision in Woodruff vs. Parham, has not been regarded as an open one in this court.

In the case at bar, the property of the plaintiff in error was assembled in warehouses where the same was assorted and exposed for sale to such of the customers of plaintiff in error as might send their specifications or orders to said warehouses in

charge of the agents of plaintiff in error, and from which deliveries were made not only to the customers of plaintiff in error residing in other states but also to its customers residing in the city of Memphis, who were accustomed to purchase and have the goods delivered from said warehouse upon the mere application therefor and specifications thereof, without the formality of previous orders or negotiations, and that these deliveries to Memphis merchants were usually made, and were made, on the same day when specifications were filed at the warehouse, provided the goods desired were then in stock in the warehouses.

The revenue statutes of Tennessee under which plaintiff in error was back assessed upon the "average capital invested" by it in its business at Memphis was designed to require defendant and others in like situation with it, without discrimination, to contribute to the revenue of the state, a tax measured by the average amount of capital employed in said business, and is the same, uniform and non-discriminating tax laid upon domestic corporations, individuals and firms engaged in the same business.

By whatever form or name plaintiff in error sought to cover up its business and evade the equal and just tax laws of Tennessee, the fact still remains that it was engaged in the business of a merchant in the city of Memphis.

State ex rel vs. Roberts, 152 *N. Y.*, 59-64.

In *Brown vs. Houston*, 114 U. S., 622, Mr. Justice Bradley said:

> "When the assessor of taxes goes his rounds must he omit from his list of taxables all goods that have come into the city from the factories of New England and New Jersey, or from the pastures and grain fields of the West? If he must, what will be left for taxation, and how is he to distinguish between those goods which are taxable and those which are not? With the exception of goods imported from foreign countries, still in the original packages, and goods in transit to some other

parts, why may he not assess all property alike that may be found in the city, being there for the purpose of remaining there till used or sold, and constituting part of the great mass of its commercial capital, provided always, that the assessment be a general one, and made without discriminating between the goods, the product of New York, and the goods the product of other states?"

In the subsequent case of *Pittsburg Southern Coal Co. vs. Bates, Sheriff*, 156 U. S., 539, the opinion of the court was delivered by Mr. Justice Field. That case was upon a writ of error to the Supreme Court of Louisiana, to review a judgment of that court, affirming the judgment of the 17th Judicial District Court of the Parish of East Baton Rouge, Louisiana. Mr. Justice Field concluded as follows:

"The decision of the court in Brown vs. Houston, 114 U. S., 622, thus rendered, seems to be conclusive of the case now before the court. The property in this case as in that, still belongs to the original owners in Pennsylvania, but is brought on the navigable waters of the United States, in boats and barges, to Louisiana, for the purpose of sale, and is subject to taxation and sale as any other property of the citizens of the United States is subject, when it becomes incorporated into the bulk of the property of the county unless there is some special exemption set forth why it should not be thus taxed and sold, of which there is none here."

Mr. Judson in his work on taxation, states the rule that, what constitutes doing business in the state by foreign corporations, is, that a corporation must have a business domicil of some sort in the state, a sales agency, manufacturing plant, *distribution warehouse*, or an interest in a domestic partnership. It must, in some way, establish a place of business within the state for doing some part of its corporate business.

Judson on Taxation, Sec. 181.

This record discloses that, the plaintiff in error found it desirable to establish, as a distributing point, the city of Memphis, and that in that city it lodged in warehouses its manufactured products until they are appropriated to its contracts of sale. Consequently its property is not only mingled with the great mass of the property in the State of Tennessee, but it is in the city of Memphis, at rest, until it is disposed of by selling it. It is not sold when it reaches Memphis, nor when it is put at rest in the warehouse, but afterwards, when each separate part of it is made by use applicable to a specific contract.

Record p. 173.

In *Emert vs. Missouri*, 156 U. S., 318-319, this court speaking through Mr. Justice Gray quoted with approval the following from the opinion in the case of Robbins vs. Shelby County taxing district:

> "As soon as the goods are in the state and become a part of its general mass of property they will become liable to pay tax in the same manner as other property of similar character, as was distinctly held by this court in the case of Brown vs. Houston, 114 U. S., 622. When goods are sent from one state to another for sale, or in consequence of a sale, they become a part of its general property and amenable to its laws; provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are. Brown vs. Houston, supra, Machine Co. vs. Gage, 100 U. S., 676. But to tax the sale of such goods or the offer to sell them before they are brought into the state is a very different thing and seems to us clearly a tax on interstate commerce itself. The negotiation of sales of goods which are in another state for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce."

Emert vs. Missouri, 156 *U. S.*, 319.

Applying these principles to the facts of this case it is not difficult to demonstrate that the tax assessed against plaintiff in error was not an effort to impose a tax either upon the sale of such goods or the effort to sell them before they were brought into the state of Tennessee, nor a tax upon the negotiations of and sales of such goods when they were in another state, because said goods were in fact not sold to any one until after they were brought into the state of Tennessee, and there stored in warehouses in precisely the same condition as other goods were stored by wholesale dealers in merchandise, but were sales and deliveries to customers upon specifications for goods without which, as demonstrated by the supreme court, no sales were or could have been made and the goods so situated in said warehouses were in fact and legal contemplation mingled with the general mass of property in the state of Tennessee, requiring the protection of the laws of the state and amenable to its just and proper burdens.

After a full statement and review of all the facts of the case, and in a manner more favorable to plaintiff in error than we thought it was entitled to upon the testimony, the Supreme Court of Tennessee in response to the contention that plaintiff in error was not liable to taxation of its goods because they were sold in the original packages, said:

> "We do not deem this a sound view, because the facts above stated show that complainant's goods were put up for sale in Memphis, and were so dealt with as to make them a part of the common mass of property in the state."
>
> *Record p.* 174.

We have referred to the opinion of Judge Hammond in *Oliver Finney Grocery Co. vs. Speed, Clerk*, 87 Fed. Rep., p. 408, to sustain our contention that the tax in question was not discriminatory against plaintiff in error, and before concluding our argument upon the particular phase of the question now being considered—the original package doctrine—we deem it proper to again call the attention of the court to Judge Hammond's well considered

opinion wherein with great powers of analysis the learned judge demonstrates that there is no conflict between the cases relied upon by plaintiff in error and the principle cases cited to support the judgment of the Supreme Court of Tennessee. The learned judge, beginning on page 413, says:

"The argument made in the brief of counsel assumes that the case of Woodruff vs. Parham, 8 Wall., 123, has been overruled by the case of *Leisy vs. Hardin*, 135 U. S., 100. This latter case was not one involving the question of taxation at all, and, even in its relation to the exercise of the police power of a state over articles of interstate commerce, it has been said in the subsequent case of *Plumley vs. Massachusetts*, 155 U. S., 461, 474, that the case must be restrained in its application to the case actually presented for determination; and it is very doubtful if it may be used, as is sought to be done in this case, to maintain the broad position that all articles of imported goods, while remaining in the original packages, are exempt from taxation, direct or indirect, for that is what this bill means in its contentions. It is still more doubtful if that principle can be held to have been established by that case in the light of the subsequent cases of Emert vs. Missouri, 156 U. S., 296, Coal Co. vs. Bates, 156 U. S., 577, and Coal Co. vs. Louisiana, 156 U. S., 590, in which the case of Leisy vs. Hardin, supra, *Woodruff vs. Parham, supra, Brown vs. Houston*, 114 U. S., 622, *Brown vs. Maryland*, 12 Wheat., 419, and many of the other cases relied upon by plaintiff's counsel in this case, are cited by the court; and there is no intimation that the case of *Woodruff vs. Parham*, supra, is regarded by that court as having been overruled. In *Emert vs. Missouri*, supra, it was distinctly held that a statute of a state by which peddlers were required, under a penalty, to take out and pay for licenses making no discrimination between residents or products of the taxing state and those of other states, is not repugnant to the constitution of the United States. And in *Coal Co.*

vs. Bates, supra, it was held that a tax upon coal in the original barges, in which it was shipped from one state to another, was subject to local taxation in the state where it was found; and in neither of these last cited cases was there any dissent among the judges who so widely differed in *Leisy vs. Hardin,* supra, and Plumley vs. Massachusetts, supra, showing that it was not considered by the court that Leisy vs. Hardin applied to the cases of taxation of imported goods held in the original packages unsold. In the cases involving the power of taxation, the determination of the question of legality or illegality as affected by the interstate commerce clause of the federal constitution seems to depend largely upon the question of unjust discrimination between the products of the taxing state and the products of other states introduced by importation; and it is conceded by the brief of counsel in this case that no such discrimination has been made by the acts of the Tennessee legislature we have now under considertaion. It is not necessary, in my judgment, to give any technical attention to any of these decisions, for the reason that it appears upon the face of the bill and the acts of the legislature that the taxes assessed and levied are not assessed and levied upon the imported goods directly, indirectly or remotely in any legal sense, but are *'a valid exercise of the power of the state over persons and business within its borders,'* to use the concluding language of Mr. Justice Gray in the case of *Emert vs. Missouri,* supra."

In the case of May vs. New Orleans, 178 U. S., 496, we respectfully submit the plaintiff in error can find no support of its contention, while on the contrary that case when analyzed supports and recognizes the distinction between the cases relied upon by plaintiff in error and those supporting the judgment of the Supreme Court of Tennessee.

In that case among other things Mr. Justice Harlan, said:

"That a state can not, in the form of a license or otherwise tax the right of the importer to sell, but when

> the importer has so acted upon the goods imported that they have become incorporated or mixed with the general mass of property in the state, such goods have then lost their distinctive character as imports, and have become from that time subject to state taxation, not because they are the products of other countries, but because they are property within the state in like condition with other property that should contribute in the way of taxation to the support of the government which protects the owner in his person and estate."

Therefore we respectfully insist that as this court can not enter into an original inquiry in respect to the facts, the Supreme Court of Tennessee has found such a state of facts as conclusively shows that plaintiff in error has so acted upon and intended to so act upon its manufactured products by bringing them into the state and putting them at rest in Memphis for the purposes of sale that the case is not only within the rule of *Woodruff vs. Parham, Lott vs. Henson, Brown vs. Houston,* and *Pittsburg Coal Co. vs. Bates,* supra, but within the reasoning of the rule laid down in *Brown vs. Maryland,* supra.

It is no answer to the cases of *Brown vs. Houston* and *Pittsburg Coal Co. vs. Bates,* to insist that the barges in which the coal taxed in these cases were brought to Louisiana constituted original packages.

We might with equal reason claim that the barges in which the kegs of nails and coils of wire were brought to Tennessee were the original packages.

But in the view we take of the question, which we submit is sound both upon reason and authority, it is wholly immaterial whether the barges and lumps of coal or the coils of wire rope constituted the original packages.

The principle underlying the question is not whether the barges in which plaintiff in error brought its goods or the kegs of nails and coils of wire were the original packages, but whether said

packages, that is the kegs of nails and coils of wire had been so used and dealt with as to make them a part of the common mass of property in the state, and on the holding of the Supreme Court of Tennessee on this question, based upon the overwhelming facts as found by it, we submit that plaintiff in error was properly assessed for taxation as a merchant upon the "average capital invested" in its business in Tennessee.

In conclusion we invite the attention of your Honors to the fact that there is and can be no complaint made by plaintiff in error that it has been subjected to an unfair or excessive assessment; that upon and under the holding of the Supreme Court of Tennessee it is only sought to lay upon plaintiff in error the same tax that is assessed against other merchants; that it is in no way discriminated against either as a foreign corporation or a merchant dealing in articles manufactured of the produce of another state; but that for more than two years prior to the assessment of the tax in question it had been engaged in business in the State of Tennessee and had had invested in said business several hundred thousand dollars worth of property which had received the protection of the laws of Tennessee, and that therefore being so engaged in business and having its capital thus invested in business within and under the protection of the laws of Tennessee the assessment of a tax against plaintiff in error as a merchant was a "valid exercise of the power of the state over persons and business within its borders," and in so holding there is no error in the judgment of the Supreme Court of Tennessee and the same should be affirmed.

Respectfully submitted,

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Supreme Court of the United States.

No. 356.—October Term, 1903.

The American Steel & Wire Company, Plaintiff in Error, *vs.* R. A. Speed, Clerk of the County Court of Shelby County, Defendant in Error. } In error to the Supreme Court of the State of Tennessee.

[February 23, 1904.]

Mr. Justice White delivered the opinion of the Court.

Whether the plaintiff in error is entitled to recover the sum of certain taxes which were paid under protest, on the ground that the taxes were repugnant to the Constitution of the United States, is the question for decision on this record.

Section 28, article II, of the constitution of the State of Tennessee, so far as pertinent to the issue to be decided, is as follows:

"All property, real, personal or mixed, shall be taxed. . . . All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property at the same value, but the legislature shall have power to tax merchants, peddlers and privileges, in such manner as they may from time to time direct. The portion of a merchant's capital used in the purchase of merchandise sold by him to non-residents and sent beyond the State shall not be taxed at a higher rate than the *ad valorem* tax on property."

Section 30, article II, of the same constitution provides:

"No article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees."

The assessing and taxing laws of the State of Tennessee in force at the time the taxes in controversy were levied provided, first, for a general *ad valorem* tax upon all property; second, for a merchants' tax separate from the general *ad valorem* levy, this latter tax being of two classes: A tax upon the average capital invested in business and a privilege tax, which was at a different rate and in other respects distinct from the merchants' tax just referred to. Moreover, at the time the tax assessments in question were made the statutes of the State of Tennessee concerning the merchants' tax contained the following:

"The term 'merchants,' as used in this act, includes all persons, copartnerships or corporations engaged in trade or dealing in any kind of goods, wares, merchandise, either on land or in steamboats, wharf boats or other craft stationed or plying in the waters of this State, and confectioners, whether such goods, wares or merchandise be kept on hand for sale or the same be purchased and delivered for profit as ordered."

Moreover, the assessment laws, whilst providing that all "persons, copartners and joint stock companies engaged in the manufacture of any goods, wares, merchandise or other articles of value shall pay an *ad valorem* tax upon the actual cash value of their property, real, personal or mixed, ... " made the following exception: "*Provided*, the value of articles manufactured from the produce of the State in the hands of the manufacturer shall be deducted in assessing the property." And a like exception qualified a provision imposing an *ad valorem* tax upon the capital and franchises of manufacturing corporations. Besides, the assessing statutes contained a general provision exempting "all growing crops of whatever nature or kind—the direct product of the soil of this State in the hands of the producer or his immediate vendee, and manufactured articles from the produce of this State in the hands of the manufacturer."

Whilst these laws were in force the officer whose duty it was to list the merchant tax assessed against the American Steel and Wire Company, which we shall hereafter call the Steel Company, both the general merchants' tax and a merchants' privilege tax. The company resisted the assessment, and, after unsuccessfully pressing, through the administrative channels provided by the law of Tennessee, its objections, paid the tax under protest, and thereupon, as authorized by the law of Tennessee, commenced this suit to recover the amount paid.

Without going into detail, it suffices to say that the bill filed in the action to recover substantially alleged as follows: That the company was a New Jersey corporation, having a place of business in the city of Chicago, and owing and operating various plants for the manufacture of wire, nails, &c. in States other than the State of Tennessee. And, for the purpose of facilitating the sale and delivery of the goods by it manufactured, it had selected Memphis, Tennessee, as a distributing point, and had made an arrangement in that city with the Patterson Transfer Company, a corporation engaged at Memphis in the transfer of merchandise. By this arrangement the Patterson Transfer Company was to take charge of the products when shipped to Memphis, consigned to the Steel Company, store them in a warehouse there, assort them and make delivery to the persons to whom the goods were sold by the Steel Company. It was averred that the Patterson Transfer Company, in fulfiling its obligations under the contract, was in no sense a merchant, but only a carrier, and that the Steel

Company, in storing and delivering its goods at Memphis, was not a merchant in Memphis, but was simply a manufacturer, delivering in the original packages goods made in other States to the persons who had bought them. In substance, besides, it was alleged that the goods in the warehouse in Memphis were merely in transit from the point of manufacture outside of the State of Tennessee to the persons to whom they had been previously sold. The levy of the tax was charged to be repugnant to the commerce clause of the Constitution of the United States: First, because the goods in the warehouse in Memphis were in the original packages as shipped from other States and had not been sold in Tennessee, and hence had not been commingled with the property of that State, and because, in any event, they had acquired no *situs* in Tennessee, as they were moving in the channels of interstate commerce from the place where the goods were manufactured, for delivery to the persons to whom in effect they had been sold. Second. Because, as the State of Tennessee exempted from taxation articles manufactured from the produce of that State, no tax could be imposed by Tennessee upon articles manufactured from the produce of other States, without operating a discrimination against articles manufactured from the produce of other States. Issue was joined on the complaint. The trial court, deducing from the proof conclusions of ultimate fact in favor of the complainant, entered a decree in favor of the Steel Company. The case was taken to the Supreme Court of the State. In that court the validity of the tax was upheld and the judgment below was reversed. The questions raised concerning the repugnancy of the tax to the Constitution of the United States were expressly considered and decided adversely to the Steel Company. This writ of error was thereupon prosecuted.

The Supreme Court of Tennessee stated the facts as follows:

"Complainant is a corporation created under the laws of New Jersey. Its situs is in the State of New Jersey, and its principal business office is situated at Chicago, Ill. It is engaged in the manufacture of nails, staples, barbed and smooth wire, at different points north of the Ohio River. None of its manufactories are situated in Tennessee, and all of its products consigned to Memphis are shipped from points beyond the limits of this State.

"Prior to the first of February, 1900, its manufactured products were sold and distributed throughout the Southwest from Louisville, Ky.; Memphis, Tenn.; Greenville, Vicksburg, and Natchez, Miss.; and New Orleans, La. About that time the Patterson Transfer Company, a corporation created under the laws of Tennessee, having its situs at Memphis, and doing business at Memphis, represented to appellee that Memphis was the most available point in the Southwest at which to mass and distribute its manufactured products to its customers in that section. At this time, and for many years prior thereto, the Patterson Transfer Company had been engaged in the business of transferring passengers and freights to and from the various depots at Memphis, and from the landings on the Mississippi River. Appellee entered into an arrangement with the Patterson

Transfer Company, whereby said company was to receive its manufactured products at Memphis, assort them so as to separate the different kinds of nails, staples and wire, and then to deliver them, either to the jobbers at Memphis, or to the jobbers beyond the limits of Tennessee, over the various lines of railroads and steamboats running into Memphis, as directed by complainants.

"None of complainant's products are ever sold to the Patterson Transfer Company, or are by it sold to others, and neither its officers nor employes have any knowledge whatever of the price at which goods are sold by complainant. Under the arrangement between them, the business of the Patterson Transfer Company, in connection with complainant's products, is confined to their transfer to the warehouses, their assortment in the warehouses, the keeping of them in storage, and their subsequent delivery to the customers of the complainant, under its general or special orders, as below indicated.

"The goods of complainant are manufactured at different points, and it is convenient and useful, from a business point of view, to mass them at some place at which they can be assorted, and from which they can be distributed to complainant's customers. It is impracticable to assort the goods either at the river landing or at the railroad depots when they reach Memphis, and, in order to facilitate the work, the Patterson Transfer Company has rented three warehouses in which the goods are stored for the purpose of assortment and distribution, and for other purposes below indicated. These warehouses are rented exclusively for this purpose, and the manufactured products of complainant, and no other goods, are stored therein.

"The evidence further shows that, as a general rule, prior to the time the goods are shipped to Memphis, sales agents of the complainant canvass the Southwestern country, and make contracts exclusively with jobbers; and in each instance where a contract is made it is embodied in writing, on a form prepared by complainant, in which is set down the amount of goods which constitutes the subject of the contract, and the time agreed upon within which they are to be del vered. The goods so contracted for are described as so many kegs of nails, so many kegs of staples, so many reels of barbed wire, or so many coils of smooth wire, according to the terms of the contract, in respect of the quantity agreed upon. But the contract does not specify the grade and quality of the goods desired. The grade and quality are left open, to be subsequently specified when the customer desires a delivery, as below stated. The customer can, when he makes his specification, select any grade of goods he desires, and, upon so selecting, they will be delivered to him, up to the quantity contracted for, within the time agreed upon, at prices contracted for applicable to the several grades. In fixing the price of its goods, the complainant always, except when necessary to lower prices in order to meet competition, figures in the freight on the goods.

"As above indicated, it is shown in the evidence that there are many different kinds of nails, as well as different kinds of barbed and smooth wire, and it is expressly stipulated in the contract that the customer shall have the privilege of specifying, during the life of the contract, the kind of wire, or kind of nails or staples he desires delivered to him under the contract. These contracts also specify from sixty to ninety days as the

time within which the products are to be delivered; and at any time during the period prescribed in the contract the customer may designate the kind of goods he desires delivered under it.

"These contracts are made, usually before the goods arrive at Memphis, their point of destination, and generally the contracts are made in advance of the production of the goods at the complainant's factory. Usually the sales agents of the complainant, not only in advance of the shipment of the goods, but in advance of their production, canvass the Southwestern country—in the manner above stated—visiting the various jobbers, ascertaining the amount of goods they will require within sixty or ninety days, and the contract is prepared to the purport above indicated, in which the complainant obligates itself to deliver, at the prices stated, as above mentioned, the amount of goods contracted for therein, and the customer agrees to receive and pay for that quantity, upon the goods being delivered to him after he shall have made, and according to, his specification, which he may make during the life of the contract; the customer reserving the right, in the face of the contract, to specify the exact grade or quality of goods he desires delivered under it. He does this after the making of the contract, and at any time he desires to do so, within the life of the contract, by writing out his specification showing precisely what grade of goods he desires, and forwards this specification to the office of complainant in Chicago, and then the goods, under an order from the Chicago office, addressed to the Patterson Transfer Company at Memphis, are selected by the latter out of the mass of goods belonging to the complainant in the aforesaid warehouses in Memphis, and are shipped by the said Patterson Transfer Company to the customer who has signed the specification. This order from the complainant to the Patterson Transfer Company is effected through the agency of a copy of the specification, which is forwarded to the latter from the complainant's central office at Chicago, it being understood, according to the course of business between the two companies, that the Patterson Transfer Company will select out of the mass of goods those set out in the specification, and will ship them to the customer whose name is signed to the specification, upon receiving such copy of the specification from the central office at Chicago.

"This method of transacting the business is modified in practice, in so far as the fulfillment of contracts made with the jobbers at Memphis is concerned. For the convenience of the Memphis trade, complainant advises the Patterson Transfer Company of the names of its customers at Memphis, and that company is instructed to deliver the goods embraced in the contracts with the Memphis jobbers, in the following manner: The Memphis jobber makes out his specification in duplicate, and addresses a letter to complainant, as in any other case; but, instead of forwarding this letter and his specification directly to complainant, he delivers the letter to the Patterson Transfer Company, and the Patterson Transfer Company at once delivers the goods so specified, attaching the dray receipt to a copy of the specification, and forwards the specification, letter and dray receipt to the office of complainant in Chicago, and that office makes out an invoice and sends it directly to the jobber. Another variation is made in the course of the business, in favor of the Memphis jobber, to the following effect: Any jobber in Memphis who is a recognized customer of the complainant can, without any previous written contract, or other special agreement, make out a specification of the goods he desires, and hand this,

in duplicate form, to the Patterson Transfer Company. Upon this being done it is the duty of the Patterson Transfer Company, under its general instructions from the complainant, to select out of the mass of goods in the warehouses, goods corresponding to those contained in the specification, and deliver them to such jobber, this delivery usually being made by the next day, or, at most, within two or three days. Other deliveries on specifications sent direct to the Chicago office are not usually made within less than six or eight days, and sometimes a longer period is required. When the Patterson Transfer Company receives from Memphis jobbers the specifications, which are the special subject of this paragraph, one copy is kept by it, and the other copy is forwarded to the office at Chicago, where, upon its arrival and reception, the customer is charged with the goods specified, at current prices.

"The testimony shows that of the mass of goods kept on hand in Memphis, in the above-mentioned warehouses, about ninety per cent ultimately goes to jobbers who reside outside of Memphis, and beyond the limits of this State. The remaining ten per cent goes to the Memphis jobbers in fulfillment of the general contracts previously referred to, pursuant to specifications thereunder made, and under specifications made without previous written contracts, the latter covering about two and one-half per cent of all the goods kept on hand.

"No one but an agreed or recognized customer of the complainant can make out a specification, or have goods delivered from the storehouses of the Patterson Transfer Company; and no goods are ever delivered or distributed to any one by the Patterson Transfer Company except under the express directions of complainant, or under general directions given by complainant to the Patterson Transfer Company, in favor of recognized and approved customers of the complainant, whose names are furnished by it to the Patterson Transfer Company.

"The testimony further shows that the quantity of goods which the complainant keeps on hand at Memphis fluctuates considerably, owing to the state of trade from time to time. Sometimes the stock is as low in value as $30,000, and sometimes the complainant has on hand a stock of the value of more than $100,000.

"Some of the goods, a very small amount, are shipped to Memphis by rail. Nearly all of these goods which come to the hands of the Patterson Transfer Company from this complainant are transported to Memphis on barges belonging to transportation companies, in which complainant has no interest, and which are engaged in the carrying trade. As a general rule, while the complainant endeavors to secure contracts covering its output before the goods are manufactured, yet it does not always do so; but, taking advantage of the seasons when there is a good stage of water in the rivers, which must be used in floating its products from its mills to Memphis, it masses its goods at the latter point in anticipation of future sales.

"The testimony shows that when goods are shipped from complainant's mills, consigned to Memphis, the Patterson Transfer Company is notified by the Chicago office that a certain quantity of complainant's products were shipped at a certain time, on barges, to the port of Memphis. These barges are met at the river landing by the Patterson Transfer Company, which receives the goods, transfers them to its warehouses and assorts them. Then, from time to time, it ships the goods on specifiations, as before ex-

plained. On receiving the goods they are credited to the complainant on the books of the Patterson Transfer Company, and, on being shipped out, they are charged on the same books to the complainant. When the goods reach Memphis they are always consigned to the complainant, in care of the Patterson Transfer Company.

"All the goods forwarded to Memphis are products of the factories of complainant. No part of them are ever purchased by it. Its sales agents are exclusively engaged in selling these products. They are produced by complainant beyond the limits of this State, and are made the subject of contracts by its sales agents throughout the Southwest, in the manner before explained. These sales agents report all contracts effected by them directly to the office in Chicago, whether made with the jobbers at Memphis, or elsewhere beyond the limits of this State. All invoices for goods, when sold by specifications in the manner above stated, are made out at the office at Chicago, and forwarded directly to the customer, in the manner and under the circumstances previous stated.

"Some of the complainant's goods are produced at one factory and some at another, and, consequently, when a purchaser contracts for the delivery to him, within sixty or ninety days, of a certain number of packages, it frequently turns out that some of the goods desired are the product of one factory, and some of another, and it is, accordingly, most convenient in the conduct of complainant's business that goods from complainant's various factories should be massed at some point where they can be dealt with in the manner before explained.

"Complainant's goods are put up in the following original packages: The nails and staples are put up in kegs, each keg weighing 100 pounds; the smooth wire in coils tied by wires, and each coil weighing 100 pounds; the barbed wire on reels, the wire on each reel weighing 100 pounds. Each package is separately and distinctly made up at the factories for convenience of transportation, and is, in this form, delivered to the common carriers. In this form they are delivered at the initial point of transportation. In this form they are transported in barges, or by railroad, to Memphis, and received by the Patterson Transfer Company. In this form they are assorted at the warehouses by the Patterson Transfer Company, and delivered by it to the complainant's customers at Memphis, under the circumstances previously stated, or to the various lines of steamboats and railroads running out of Memphis, consigned, under circumstances previously stated, to customers beyond the limits of Tennessee, and in this form they ultimately come to the hands of complainant's customers in such foreign States. Each package is separate and distinct in itself, and while no particular package is consigned to any special customer, each keg of nails and staples is marked so as to show exactly what the package contains, and each coil and reel of wire is marked with a tag showing what the coil or reel contains, and no package is ever changed in any particular from the time it leaves the factory until it ultimately reaches the hands of the customer.

"The testimony shows that Memphis has, within recent years become, by reason of its accessibility to railway and river transportation, a great distributing point; and it was selected as the basis of the operations which are the subject of the present controversy, by reason of these exceptional advantages.

"Other facts proven by the complainant are as follows: The testimony of Mr. Young, the tax assessor, shows that none of the cotton shipped into Memphis from the surrounding States pay any tax whatever, and that the manufacturers of lumber in Memphis pay no tax on lumber made from logs which are produced from the soil of this State."

With these facts in hand we are of opinion that the court below was right in deciding that the goods were not in transit, but, on the contrary, had reached their destination at Memphis, and were there held in store at the risk of the Steel Company, to be sold and delivered as contracts for that purpose were completely consummated. All question, therefore, as to the power of the State to levy the merchants' tax based, on the contrary contention, being without merit, may be put out of view. The other propositions pressed upon our attention require consideration. They relate to two subjects: First, the asserted want of power of the State of Tennessee to tax because the goods were imported from another State, and were yet, it is contended, in the original packages; and, second, because of the alleged discrimination asserted to result from the provision of the State constitution exempting goods manufactured from the produce of the State.

1. Since *Brown* v. *Maryland*, (12 Wheat. 436,) it has not been open to question that taxation imposed by the States upon imported goods, whether levied directly on the goods imported or indirectly by burdening the right to dispose of them, is repugnant to that provision of the Constitution providing that "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports." (Article I, sec. 10, paragraph 3.) And *Brown* v. *Maryland* also settled that where goods were imported they preserved their character, as imports, and were therefore not subject to either direct or indirect State taxation as long as they were unsold in the original packages in which they were imported. A recent case referring to the authorities and restating this elementary doctrine is *May* v. *New Orleans*, (178 U. S. 496.) Assuming that the goods concerning which the State taxes in this case were levied were in the original packages and had not been sold, if the bringing of the goods into Tennessee from another State constituted an importation, in the constitutional signification of that word, it is clear they could not be directly or indirectly taxed. But the goods not having been brought from abroad, they were not imported in the legal sense and were subject to State taxation after they had reached their destination and whilst held in the State for sale. This is as conclusively foreclosed by the decisions of this court as is the doctrine resting upon the decision in *Brown* v. *Maryland*. (*Woodruff* v. *Parham*, 8 Wall. 123; *Brown* v. *Houston*, 114 U. S. 622.) The doctrine upon which the cases rest was this, that imports, in the constitutional sense, embraces only goods brought from a foreign country, and consequently does not include merchandise shipped from one State to another. The several States, therefore, not being controlled as to such merchandise by the prohibition against the

taxation of imports, it was held that the States had the power, after the goods had reached their destination and were held for sale, to tax them, without discrimination, like other property situated within the State.

Those two cases, decided, the one more than thirty-five and the other more than eighteen years ago, are decisive of every contention urged on this record depending on the import and the commerce clause of the Constitution of the United States. The doctrine which the two cases announced has never since been questioned. It has become the basis of taxing power exerted for years, by all the States of the Union. The cases themselves have been approvingly referred to in decisions in this court too numerous to be cited, and we therefore content ourselves by mentioning two of the cases where the doctrine was restated. (*Emert* v. *Missouri*, 156 U. S. 296; *Kelley* v. *Rhoades*, 188 U. S. 1.) But it is strenuously insisted that the principle of the cases referred to, reiterated again and again and uniformly followed for so long a period of time, has been by inevitable implication overruled by the cases of *Leisy* v. *Harden*, (135 U. S. 100,) *Lyng* v. *Michigan*, (Ib. 161,) and other cases resting on the rule expounded in those cases.

We might well leave the unsoundness of the proposition to be demonstrated by what we have previously said, and also by the fact that, in *Leisy* v. *Hardin* and *Lyng* v. *Michigan*, and most of the similar cases relied on, the decisions in *Woodruff* v. *Parham* and *Brown* v. *Houston* were referred to without even an intimation that those cases were deemed to be overruled or even qualified. The earnestness with which the contention is pressed induces us, however, briefly to point out the misconception upon which it rests. It results from assuming that the rule which governs in a case where there is an absolute prohibition is applicable where no such prohibition obtains. *Brown* v. *Maryland* illustrates the first of these cases, while *Woodruff* v. *Parham*, *Brown* v. *Houston*, *Leisy* v. *Hardin*, *Lyng* v. *Michigan* are examples of the other. Thus, in *Brown* v. *Maryland* there was an absolute want of power to tax imports, and it was held that a State enactment which operated to tax imports, whether directly or indirectly, was within the positive prohibition. In other words, that imports could not be taxed at all until they had completely lost their character as such. *Woodruff* v. *Parham* and *Brown* v. *Houston*, on the other hand, so far as interstate commerce was concerned, dealt with no positive and absolute inhibition against the exercise of the taxing power, but determined whether a particular exertion of that power by a State so operated upon interstate commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress. In order to fix the period when interstate commerce terminated, the criterion announced in *Brown* v. *Maryland*, that is, sale in the original packages at the point of destination, was applied. The court, therefore, conceded that the goods which were taxed had not completely lost

their character as interstate commerce, since they had not been sold in the original packages. As, however, they had arrived at their destination, were at rest in the State, were enjoying the protection which the laws of the State afforded, and were taxed without discrimination like all other property, it was held that the tax did not amount to a regulation in the sense of the Constitution, although its levy might remotely and indirectly affect interstate commerce. In *Leisy* v. *Hardin* and *Lyng* v. *Michigan* the same question in a different aspect was presented. The goods had reached their destination and the question was not the power of the State to tax them, but its authority to treat the goods as not the subjects of interstate commerce and to prohibit their introduction or sale. This was held to be a regulation within the constitutional sense, and therefore void. The cases, therefore, did not decide that interstate commerce was to be considered as having completely terminated at one time for the purposes of import taxation, and at a different period for the purposes of interstate commerce. But both cases, whilst conceding that interstate commerce was completely terminated only after the sale at the point of destination in the original packages, were rested upon the nature and operation of the particular exertion of State authority considered in the respective cases.

2. The discrimination is asserted to have arisen from the provision of the State constitution, saying that "no article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees." But in *Kurth* v. *State*, (1887) 86 Tenn. 144, it was decided that this provision of the constitution referred only to a direct levy of taxation on articles manufactured of the produce of the State, and did not apply to taxes levied by virtue of the grant conferred by the constitution to tax "merchants, peddlers, and privileges, in such manner as they (the legislature) may from time to time direct." The two provisions, it was held, should be construed together, so that the one would not limit the other. We have been referred to no case decided by the Supreme Court of Tennessee modifying this interpretation of the State constitution, and its correctness is in effect directly affirmed by the ruling made by the court in this case. Now the tax complained of on this record is not the general *ad valorem* tax levied on property as such but is a merchants' tax, and is therefore not within the purview of the exemption clause from which it is asserted the discrimination arises. Construing the taxing statutes of the State the court below decided in this case that they equally apply to all merchants, and hence did not discriminate as against any member of the merchants' class. The argument is made that under the facts found by the court below it was erroneously held that the Steel Company, because of the business which it carried on in the State of Tennessee, was a merchant within the statutes and the power to review this question, it is insisted, should be exerted because the question is Federal in its nature. The contention is without merit. As the levy

of the merchants' tax violated no Federal right, the mere determination of who were merchants within the State law involved no Federal question. The construction of the State law being conclusive and embracing all persons doing a like business with the Steel Company, it follows that there was no discrimination. Conceding it to be true, as argued, that in the past there would seem to have been conflict of opinion in the court of Tennessee in interpreting various statutes concerning the merchants' tax, this contrariety does not concern the meaning of the statute construed in this case. As that statute has been construed by the State court as applying to all merchants and as embracing alike all persons engaged in the character of business which the Steel Company was carrying on, it follows that there is no ground upon which to predicate the complaint of undue discrimination, Nor do we think that the opinion of the Supreme Court of Tennessee in *Benedict et al.* v. *Davidson Caunty*, not yet officially reported, (67 S. W. 806,) conflicts with the views just expressed. That case involved, not a merchants' tax, but the validity of a general *ad valorem* levy on property as such, and, therefore, affords no ground for the contention that manufacturers in Tennessee who shipped the goods by them made from the products of the State to a depot for sale, and there sold them under conditions and circumstances identical with those presented here, could not be taxed as merchants under the law of Tennessee.

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.